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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 982

HANES HOSIERY DIVISION-HANES CORPORATION, *Petitioner*

vs.

NATIONAL LABOR RELATIONS BOARD, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

To the Honorable, The Chief Justice and the Associate Justices of the Supreme Court of the United States:

The Petitioner prays the Court for a Writ of Certiorari directed to the United States Court of Appeals for the Fourth Circuit, to the end that this Court may review a decision which that Court has rendered in a case involving the parties above-named. And the Petitioner respectfully shows to this Court:

THE OPINION AND THE JUDGMENTS IN THE COURTS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit has not yet been printed in the official

reports, but may be found in the following unofficial reports: — 66 LRRM 2264 (1967) and 56 Labor Cases ¶12,210 (1967). Both the opinion and the Judgment of the Court of Appeals are printed in the Appendix to this Petition.

This case came to the Court of Appeals upon an appeal from the United States District Court for the Middle District of North Carolina. The District Court did not hand down a written opinion, except as embodied in its Judgment. The Judgment of the District Court is printed in the Appendix to this Petition.

JURISDICTION OF THIS COURT

The Opinion of the Court of Appeals was rendered on October 3, 1967. The Judgment of that Court is dated October 4, 1967, and was entered by that Court on that date.

Jurisdiction to review the Judgment of the Court of Appeals is conferred on this Court by the provisions of 28 U.S.C. §1254.

QUESTIONS PRESENTED FOR REVIEW

(1) Is it within the authority of the National Labor Relations Board to compel an employer to assist a labor Union in communicating with employees, by ordering the employer to furnish to the Union the names and the home addresses of the employees?

(2) May the Board require the employer to do this, even though the employees do not wish it to be done?

(3) Is not such a directive itself in violation of the National Labor Relations Act?

(4) When the Board issues what it terms a "subpoena" of this information, for the avowed purpose that the Union may thereby be aided in its organizational and electioneering efforts among the employees, is such demand in any true sense a subpoena of evidence and enforcible as a subpoena by a United States District Court?

(5) Even if such a demand could be regarded as a subpoena of evidence, is not the issuance of a decree by a United States District Court, enforcing such a "subpoena," in any event within the sound discretion of that Court?

(6) Does not the law deny to United States District Courts any general jurisdiction to issue injunctions in controversies arising out of Labor Board "representation" proceedings?

(7) Even if a United States District Court has any general jurisdiction to issue an injunction in a controversy arising out of a Labor Board "representation" proceeding, does not the issuance of such an injunction, like any other exercise of the Court's injunctive power, rest within the sound discretion of the District Court?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Portions of the Constitution of the United States and of the National Labor Relations Act pertinent to this case are as follows:

"Congress shall make no law . . . abridging the freedom of speech . . . or the right of the people peaceably to assemble . . ."

First Amendment to the Constitution of the United States

"No person shall be . . . deprived of life, liberty, or property, without due process of law . . ."

Fifth Amendment to the Constitution of the United States

"The enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people.

Ninth Amendment to the Constitution of the United States

"Employees shall have the right to . . . join or assist labor organizations . . . and to engage in other concerted activities . . . and shall also have the right to refrain from any or all of such activities . . ."

29 U.S. C. §157

"It shall be an unfair labor practice for an employer . . . to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7."

29 U.S.C. §158(a)(1)

"It shall be an unfair labor practice for an employer . . . to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it . . ."

29 U.S.C. §158(a)(2)

"If the Board finds upon the record of such hearing that such a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof." 29 U.S.C. §159(c)(1)

"The Board . . . shall at all reasonable times have . . . the right to copy any evidence of any person being investigated or proceeded against that relates to any matter under investigation or in question."

29 U.S.C. §161(1)

"In case of contumacy or refusal to obey a subpoena issued to any person, any District Court of the United States . . . shall have jurisdiction to issue to such person an order requiring such person . . . to produce evidence . . . [or] give testimony touching the matter under investigation or in question . . ."

STATEMENT OF THE CASE

On April 5, 1966, the Textile Workers Union of America AFL-CIO filed with the Regional Director of the National Labor Relations Board at Winston-Salem, North Carolina, a Petition asking that this Union be certified as the representative of the employees of Hanes Hosiery Division-Hanes Corporation at the Company's hosiery plants in Winston-Salem, North Carolina (7[1]).

After conducting a hearing as to what categories and classifications of employees should be eligible to vote, the

[1]All references having no other designation than page numbers are references to the printed Appendix to the brief of the National Labor Relations Board, Appellant, filed by the Board in the Court of Appeals, below, a copy of which is now on file with this Court.

Board's Regional Director directed that an election be held among these employees on a date later to be set (13).

In his directive, the Regional Director also ordered that the Company should, within seven days of the date of his directive, furnish to him, so that he might turn over to the Union, the names and the home addresses of the employees (13).

It is undisputed, and the District Court found as a fact, that the Company thereupon wrote to the Regional Director stating that it was "entirely willing" to furnish him with a list of employees, to be used in the conducting of the election, and for purposes of checking voting eligibilities, according to the Board's "normal practice and procedure," but the Company explained to the Regional Director that it was not willing to furnish the employees' names and addresses "for the use of the Union in communicating with, and promoting its organizing efforts among, such employees" (30-31, 38, Appendix,[1] p. 10a).

The Regional Director thereupon issued what he termed a "subpoena" for the names and addresses of the employees (35). The Company petitioned the Board for revocation of this "subpoena" (37). The Board by telegram promptly denied the Company's petition (39).

The Board then instituted a suit in the United States District Court for the Middle District of North Carolina, asking that Court to require the Company to furnish the names and addresses of the employees, so that the same might be delivered to the Union (2). The Court directed

[1]The Appendix to this Petition.

the Company to appear and show cause as to why it should not be so ordered (39).

Upon full hearing, the District Court held that the Regional Director's demand upon the Company exceeded his "lawful authority" (Appendix, p. 11a).

As to the Board's procedure in asking the District Court to enforce the Board's "subpoena," the Court held that such "subpoena" did "not seek the production of any testimony or evidence to prove or disprove any fact or question in issue in any proceeding," either before the Board or the Court, and that therefore "Section 11 (2) of the National Labor Relatoins Act, 29 U.S.C. 161 (2)," invoked by the Board was "not applicable or relevant;" and that the Court did not otherwise have any jurisdiction to enforce directives issued by the Board in its "representation" proceedings (Appendix, p. 11a).

The Court further ruled that if it had jurisdiction to enforce the Board's "subpoena" or if it otherwise had jurisdiction to order compliance with Board directives in "representation" proceedings, "then, and in either such event, the exercise of such jurisdiction is within the sound discretion of the Court, and the Court, in its discretion," declined "to issue such enforcement or order" (Appendix, p. 12a).

From the Judgment of the District Court, the Board appealed to the United States Court of Appeals for the Fourth Circuit. The Court of Appeals reversed the District Court, declaring that "the relief prayed in the Complaint" should be granted, and remanding the case to the District Court for an order to such effect (Appendix, p. 6a).

REASONS WHY A WRIT OF CERTIORARI SHOULD BE GRANTED

This case presents an important and novel question of Federal law which has not been, but should be, decided by this Court.

The National Labor Relations Board concedes that the directive which is here at issue is an innovation on its part, and one which will be involved in every employee election henceforth conducted under the National Labor Relations Act.

The question tendered is therefore of wide importance in the interpretation and administration of the National Labor Relations Act and in the proper settling of national labor policy.

To assist a Union toward winning employee votes, by ordering the employer to give to the Union the names and the home addresses of such employees, is, of course, not an authority expressly conferred upon the Labor Board in the National Labor Relations Act. Rather, the Board now, and after more than thirty years, declares that it has an implied grant of such authority—in the simple statutory provision that upon a question of "representation," the Board 'shall direct an election." 29 U.S.C. §159(c)(1).[1]

Whatever might otherwise be argued in support of such an implication, it is definitely forbidden by other provisions

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[1]The United States Court of Appeals for the Second Circuit has very recently refused to grant enforcement to a Board directive giving a Union access to the names and addresses of employees, by way of remedy for employer unfair labor practices. *J. P. Stevens & Co., Inc. vs. National Labor Relations Board,* ___ F. 2d ___ (2nd Cir., Dec. 27, 1967).

of the National Labor Relations Act. Moreover, it clashes with basic and constitutional rights of both the employer and the employees—it being uncontested in this case that the employees of the Petitioner have not authorized the placing of their names and home addresses in the hands of the Union, and that many of them, on the contrary, have made it clear that they do not want this to be done.

Nor is there, in any event, any procedure by which the Board could accomplish what it here seeks in a United States District Court. First, the Board invoked action by the District Court below under 29 U.S.C. §161, relating to the subpoenaing of evidence. But a statute authorizing the subpoenaing of evidence has no application to an ordering of information for the purpose of communicating with voters and the influencing of their votes.

Next, the Board urged that the District Court could issue an order in the Board's behalf under the Court's general injunctive power. Yet the law is clear that the District Courts do not have any general authority to step into controversies arising in Labor Board "representation" proceedings and issue injunctive orders. The Board itself has heretofore been foremost in maintaining this principle.

Finally, action by the District Court, either by way of "subpoena" enforcement or under any claim of general injunctive power, was within the Court's discretion, and the District Court below, upon all the facts of this case and in "the exercise" of its "sound discretion," declined to issue any such order as was sought by the Board.

In the light of these considerations militating against the ruling of the Court of Appeals — and the Board's

directive being one which will affect all employees, all labor organizations and all employers in all Labor Board elections henceforth — it is respectfully submitted that this is a case which should now be reviewed by this Court.

ARGUMENT AMPLIFYING REASONS WHY A WRIT OF CERTIORARI SHOULD BE GRANTED

I.

The Board's Directive Exceeds The Board's Authority

A. Nothing In The National Labor Relations Act Conveys Or Implies Authority To Issue Such Directive

As has been pointed out above, the National Labor Relations Act provides that when "a question of representation exists," the Labor Board "shall direct an election." 29 U.S.C. §159(c)(1). From that simple provision, the Board now seeks to draw an authorization to decree that in such an election proceeding, the employer shall assist the Union toward communicating with the employee voters — by delivering into the hands of the Union a list of the names and home addresses of the employees.

The Court of Appeals speaks of the Board's new directive as one which the Board "could justifiably consider" as "necessary to an intelligent election" (Appendix, p. 4a). There is much, on the other hand, to support the view that the purpose of the Board's directive is to assist Unions toward winning more elections, as will be hereinafter further discussed. Such, in any event, would be a natural and logical result of the new order.

Let us commence, however, with the obvious proposition that a list of the names and addresses of employees in the hands of the Union would aid the Union in communicating with the employees and that this, in turn, would tend to produce an "electorate" more fully "informed" as to the Union's position (Appendix, p. 5a). Still these questions immediately arise: (1) where in the Statute does the Board find any authority for compelling the employer to assist the Union toward persuading or informing the electorate; (2) are there not provisions in the Statute forbidding any such action on the part of the employer; and (3) what rights of the employees and of the employer are overridden by the imposition of this new compulsion?

As to the first of these questions, it has already been emphasized that the Act provides only that the Board shall conduct an election. It is a strain and a stretch indeed to derive from this an authority to issue the order now in question. It must constantly be borne in mind that this is not an order to prevent the employer from raising barriers against Union access to employees. Rather, it is an order requiring the employer to prepare and provide and furnish a means of Union access to employees.[1]

And the Board now declares this order to be "fundamental to a fair and free election" (27). It is submitted

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[1]As has been hereinbefore noted, the United States Court of Appeals for the Second Circuit has very recently refused to grant enforcement to a Board directive giving a Union access to the names and addresses of employees, by way of remedy for employer unfair labor practices. *J. P. Stevens & Co., Inc. vs. National Labor Relations Board,* ___ F. 2d ___ (2nd Cir., Dec. 27, 1967).

that this statement by the Board is a reflection upon both the genuineness and the force of the Board's position on this entire matter. For more than thirty years, the Board never required, and never claimed that it had any power to require, that which it now suddenly discovers to be "fundamental" to any and every "fair and free election."

What necessarily follows is somewhat stultifying to the Board, namely, that during all the years of its administration of the National Labor Relations Act, it has omitted a requirement which is "fundamental" to any "fair and free election."

B. The National Labor Relations Act Forbids Such Action As The Board Has Here Ordered

Not only does the National Labor Relations Act give the Board no authority to compel assistance by an employer to a Union, the Act positively forbids any such assistance. Section 8(a)(2) of the Act expressly provides that it is unlawful for an employer to contribute any "support" to "any labor organization." 29 U.S.C. §158 (a)(2).

Can there be any doubt that delivering to a Union, during an election campaign the names and home addresses of the employees, whose votes the Union seeks to win, constitutes a valuable "support" to that Union? Indeed, the Union in the present case considered the Company's furnishing it with the names and addresses of employees to be a "support" so valuable that the Union would not go to an election without it (35).

The employer's furnishing of employees' names and addresses, for the use of a Union in an election campaign,

has in fact been heretofore held to be a violation of Section 8(a)(2) of the Act. Such has been the ruling of both the Board and the Courts.

Hershey Metal Products Co., 76 NLRB 695, 21 LRRM 1237 (1948).

Wagner Iron Works, 104 NLRB 445, 32 LRRM 1104 (1953).

National Labor Relations Board vs. Wagner Iron Works, 220 F. 2d 126 (7th Cir., 1955).

"Respondent's furnishing of a list of the names and addresses of its employees to the District Council of Carpenters (AFL) was an illegal act of assistance under §8(a)(2) of the Act."

National Labor Relations Board vs.
L. Ronney & Sons Mfg. Co.,
206 F. 2d 730, 734 (9th Cir., 1953)

"We agree with the Trial Examiner that this act by the Company (furnishing employees' names and addresses to a Union) constituted illegal assistance."

A. O. Smith Corporation vs.
National Labor Relations Board,
343 F. 2d 103, 114 (7th Cir., 1965)

The Board contends that Section 8(a)(2) applies only to a situation in which the employer gives the assistance of employee names and addresses to one of two competing Unions and not to the other. It is submitted that there is no basis whatever for any such contention on the part of the Board. The Act unequivocally states that an employer's

furnishing assistance or support to "any labor organization" is prohibited.

In its opinion in the present case, however, the Court of Appeals took no note whatever of this clear and specific statutory proscription.

C. Fundamental Rights Of The Employees Are Violated By The Board's Directive

There is still further provision of the National Labor Relations Act bearing on this matter. Section 7 of the Act provides that employees shall "have the right to refrain from any or all" actions tending to "assist" any Union organizing or collective employee efforts of any nature. 29 U.S.C. §157.

Obviously, a Union seeking to win the votes of certain employees, is assisted by having their names and home addresses. It has already been pointed out that in the present case the Union regarded this as such vital assistance that it was unwilling to go to an election without it (35).

Obviously also, if employees have a right to refrain from rendering assistance to the Union through the giving of their names and addresses to it, then it is likewise their right that their employer shall not do so. Otherwise, the right given them is indeed illusory. And Section 8(a)(1) of the Act, of course, does command the employer not to interfere with or circumvent the right of employees to refrain from "any" and "all" aid to the Union. 29 U.S.C. §158(a)(1).

As has been pointed out, there is no evidence in this case that the Company has any authorization from its

employees to give their names and addresses to the Union which is here involved. On the contrary, the uncontested evidence is that the employees have "never authorized" the Company "to furnish their names and home addresses to anyone" (31). And it is further a fact, likewise uncontroverted, that many of these employees have directly made known to the Company that they definitely "do not want" the Company "to give out" their names and home addresses "to anyone" (31).

One would suppose that surely the National Labor Relations Board, statutory protector of the rights of employees, would not intend to require that an employee must be subjected to visitations and solicitations at his home, if it could be ascertained that such is definitely contrary to his wishes. Certainly, one assumes, this would not be the purpose of the Board in the face of the employee's express "right to refrain" specified in the very Act which the Board administers.

Yet this *is* the Board's purpose and this is exactly what the Board *does intend*. Amazingly, the Board declares that "an employee's failure to provide a Union with his name and address" is not "an exercise" of the "right to refrain" guaranteed to him in Section 7 of the Act (24).

Even more clear to this effect are the rulings of the Board implementing its new requirement. In recent cases before the Board, employers have, in apt time, placed in the hands of each of their employees a stamped envelope addressed to the appropriate Regional Director of the Board, so that each employee might exercise individual freedom and choice to decide for himself whether he

wished to send his name and address to the Regional Director for delivery to the Union or not. The Board flatly ruled that this was unacceptable. *Union Bleachery,* 63 LRRM 1208 (1966), *Capital Cities Broadcasting Corporation,* NLRB Case No. 1-RC-9279 (1967).

In other words, says the Board, the employer must in all cases furnish each employee's name and address to the Union "so as to insure" Union contact with him at his home (25), whether the employee wishes it or not and no matter how strongly he may desire that this shall not take place.

The conclusion cannot be avoided that in this the Board shows itself more interested in the candidate than in the electorate — and more concerned with the promotion of Union organization than with the wishes, and indeed the statutory rights, of employees.

Similarly, a District Court, in upholding the requirement which is here at issue, said that "the right to organize these employees" must be made "real." *National Labor Relations Board vs. Rohlen,* 64 LRRM 2168, 2171 (U.S.D.C., Northern District of Illinois, 1967). That Court, like the Board, seemed to forget that the Act was written not for Union organizers, but for employees.[1]

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[1]In this connection, the following circumstances are sharply pertinent. The Board ruling here in controversy was first announced by the Board in the case of *Excelsior Underwear, Inc.,* 156 NLRB No. 111, 61 LRRM 1217 (1966), (21). *General Electric Co.,* 156 NLRB 112, 61 LRRM 1222 (1966) was a companion case to *Excelsior.* The decisions in both cases were handed down on the same day, February 4, 1966.

In the *General Electric* case, the Union also asked the Board to rule that, during election campaigns, employers must give Union

The Court of Appeals in the present case says that requiring the employer to furnish employee names and addresses to the Union "is not an interference with the employees' right to organize" (Appendix, p. 5a). "In truth," says the Court, "it is an assist to that end" (Appendix, p. 5a).

Indeed it is. But the Statute, of course, prescribes an equal and opposite right not to organize and to refrain from anything that assists toward organizing. The Statute then fortifies that employee "right to refrain" by directing the employer not to undermine it and further by commanding him not to give assistance to any Union.

All this the Court below strangely overlooks. Instead the Court sanctions a situation, in which the Board, established by the Act to defend employee rights, has issued an order directing an employer to take a step, forbidden to him by the Act, and in so doing to invade employee rights guaranteed to them by the Act.

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organizers access to their Plants for the purpose of making speeches to assemblies of employees. The Board tentatively denied this request, saying that:

> "In light of the increased opportunities for employees access to information, which should flow from *Excelsior* . . . we prefer to defer any reconsideration of current Board doctrine in the area of Plant access until after the effects of *Excelsior* become known."

Obviously, by "effects" the Board means election results. How else could the "effects" of *Excelsior* become "known"? Beyond Cavil then, the Board was saying that it would wait and observe the outcome of elections to determine whether the aid it had given to the Unions in *Excelsior* proved to be a sufficient aid to them, and if not, then it would reconsider further means of assisting their organizational efforts.

But, says the Board, the employee's rights are preserved to him, in that he may vote against the Union, if he wishes, when the election takes place. Meanwhile, the Board points out, he can, if he desires, "turn away" the Union organizers who, in possession of his name and home address, may begin to besiege his door (Board's brief in Court of Appeals, p. 42[1]).

And the Court of Appeals, in similar vein, declares that if there be an "apprehension" that the requirement in question may "expose the employees to harassment by the Union organizers in solicitation of support," "the answer is that every annoyance of the voters is shunned by the seasoned campaigner, and the Unions are not novices in this area" (Appendix, p. 5a).

It is respectfully submitted, however, that the interests and the rights of the employees in this matter may not be thus casually disposed of. The necessity of confrontation with Union organizers at his home may be a matter of very genuine and very deep concern to the employee.[2]

To be sure, the employee can "turn away" the Union representatives, either immediately or after conversation with them. But doing so many involve unpleasantness and

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[1]Such also is the reasoning of a District Court in *National Labor Relations Board vs. British Auto Parts, Inc.*, 64 LRRM 2786, 2789 (U.S.D.C., Central District of California, 1967).

[2]It should be noted that such visits by the employer or his representative to the employee's home for the purpose of discussing the subject of unionization, or the pros and cons of a forthcoming election, are strictly prohibited by the Board. *Peoria Plastics Company*, 117 NLRB 545 (1957).

strain and, even under the best of circumstances, may be entirely at variance with the demeanor which the employee would like to maintain with all visitors at his home. Moreover, any rebuff of the Union representative necessarily identifies the employee's position on the subject at issue, and this he may strongly have preferred not to reveal.

The employee could, of course, dissemble and pretend to favor the Union cause, but this he may be entirely unwilling to do. If, on the other hand, he feigns neutrality or indecision, this may still be a pretense which disturbs him deeply. And certainly it would tend to encourage further visitation and efforts at persuasion.

All in all, there is no denying the fact that the forced disclosure of names and home addresses may mean, and in numerous instances will mean, embarrassment, unpleasantness, tension and disturbance to many people.

And again it must be remembered that the issue here is not whether Union organizers shall be denied the opportunity of going to employees' homes, but whether it shall be compulsory upon the employer to lead them there.

Why should it be required by Governmental decree that Union representatives *must* be given the means of confronting the employee at his home? Why must they now be shown to his door *as a matter of law?* How is this compatible with the employee's statutory right to stand aside completely from the whole Union organizational effort?

More than that, is not this Board-ordered access to his home, irrespective of his wishes, an invasion of his con-

stitutional rights? Does it not plainly disregard his freedom of association and his rights of liberty and of property, under the First, Fifth and Ninth Amendments to the United States Constitution?

There is nothing in the law more hallowed and respected, more justified and necessary, than the concept that a "man's home is his castle."[1]

And it is in his home that the citizen's right to associate or not to associate as he wishes, to be secure in his liberty and his property, to have privacy and "to be let alone"—it is in his home that these rights are at their strongest. More and more the thrust of constitutional explication is to protect him in such rights and interests.

The present case is, furthermore, most obviously within the scope of such development. For the Bill of Rights in the Federal Constitution was, of course, set up originally and directly as a panoply against intrusions by the Federal Government. Here the intrusion complained of is not an action by a private person or a State, but specifically and solely it is an action of an agency of the Federal Government.

The case of *Public Utilities Commission vs. Pollak*, 343 U. S. 451, 72 S. Ct. 813, 96 L. Ed 1068, involved the question as to whether passengers riding on public vehicles in

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[1]"The home of everyone is to him as his castle and fortress." Semayne's Case, 5 Rep 916, quoting Sir Edward Coke.

"One of the most essential branches of English liberty is the freedom of one's home. A man's home is his castle; and Whilst he is quiet, he is as well guarded as a prince in his castle." Marke, Vignettes of Legal History, 256, Reprint (1965).

the District of Columbia were, under the United States Constitution, entitled to prevent the broadcast of musical and advertising programs on such public vehicles. This Court, answering in the negative, made it quite clear that its ruling would have been opposite if the case were one involving "the privacy to which [the citizen] is entitled in his own home." *Public Utilities Commission vs. Pollak,* 343 U. S. 451, 464, 72 S. Ct. 813, 96 L. Ed 1068, 1078.

Justice Black, concurring, stated that he would uphold constitutional protection whether in public or private if Governmental action resulted in the individual's being subjected to the dissemination of "views or propaganda of any kind." *Public Utilities Commission vs. Pollak,* 343 U. S. 451, 466, 72 S. Ct. 813, 96 L. Ed 1068, 1079. Justice Douglas, in dissenting, emphasized that "Liberty in the constitutional sense must . . . include privacy as well, if it is to be a repository of freedom. The right to be let alone is indeed the beginning of all freedom . . . It gives the guarantee that a man's home is his castle . . . Once privacy is invaded, privacy is gone." *Public Utilities Commission vs. Pollak,* 343 U. S. 451, 467, 469, 72 S. Ct. 813, 96 L. Ed 1068, 1080, 1081.

This Court has further said:

"In *NAACP vs. Alabama,* 357 U. S. 449, 462, 2 L. Ed 2d 1488, 1499, 78 S. Ct. 1163, we protected the 'freedom to associate and privacy in one's associations', noting that freedom of association was a peripheral First Amendment right. Disclosure of membership lists of a constitutionally valid association, we held, was invalid

'as entailing the likelihood of a substantial restraint upon the exercise by petitioner's members of their right to freedom of association.' Ibid. In other words, the First Amendment has a penumbra where privacy is protected from governmental intrusion.

"The Fourth and Fifth Amendments were described in *Boyd vs. United States,* 116 U.S. 616, 630, 29 L.Ed 746, 751, 6 S. Ct. 524, as protection against all governmental invasions 'of the sanctity of a man's home and the privacies of life.' We recently referred in *Mapp vs. Ohio,* 367 U. S. 643, 656, 6 L. Ed 2d 1081, 1090, 81 S. Ct. 1684, 84 ALR2d 933, to the Fourth Amendment as creating a 'right to privacy, no less important than any other right carefully and particularly reserved to the people.' See Beaney, the Constitutional Right to Privacy, 1962 Sup Ct Rev 212; Griswold, The Right to be Let Alone, 55 Nw UL Rev 216 (1960).

"We have had many controversies over these penumbral rights of 'privacy and repose.' See, e.g. *Breard vs. Alexandria,* 341 U. S. 622, 626, 644, 95 L. Ed 1233, 1239, 1249, 71 S. Ct. 920, 35 ALR2d 335; *Public Utilities Comm'n vs. Pollak,* 343 U. S. 451 96 L. Ed 1068, 72 S. Ct. 813; *Monroe vs. Pape,* 365 U. S. 167, 5 L. Ed 2d 492, 81 S. Ct. 473; *Lanza vs. New York,* 370 U. S. 139, 8 L. Ed 2d 384, 82 S. Ct. 1218; *Frank vs. Maryland,* 359 U. S. 360, 3 L. Ed 2d 877, 79 S. Ct. 804; *Skinner vs. Oklahoma,* 316 U. S. 535, 541, 86 L. Ed 1655, 1660, 62 S. Ct. 1110. These cases bear witness that the right of

privacy which presses for recognition here is a legitimate one." *Griswold vs. Connecticut,* 381 U. S. 479, 483-485, 85 S. Ct. 1678, 14 L. Ed 2d 510, 514, 515

It was Justice Brandeis who characterized the "right to be let alone" as "the most comprehensive of rights and the right most valued by civilized men."[1] *Olmstead vs. United States* (dissenting opinion) 277 U. S. 438, 478, 48 S. Ct. 564, 72 L. Ed 944, 956.

Certainly it is a "valued" right which is being very carelessly ignored by the new directive herein issued.

There can be no doubt as to the standing of the Petitioner to raise these issues — particularly where, as here, the Petitioner is the immediate target of the questioned order and the unwilling instrumentality by which it is to be effectuated.

In *Truax vs. Raich,* 239 U. S. 33, 36 S. Ct. 7, 60 L. Ed 131, an employee was permitted to assert the rights of his employer. In *Pierce vs. Society of Sisters,* 268 U. S. 510,

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[1]"Great as is the value of exposing citizens to novel views, home is one place where a man ought to be able to shut himself up in his own ideas if he desires. There he should be free not only from unreasonable searches and seizures but also from hearing uninvited strangers expound distasteful doctrines. A doorbell cannot be disregarded like a handbill. It takes several minutes to ascertain the purpose of a propagandist and at least several more to get rid of him . . . Freedom of the home is as important as freedom of speech. I cannot help wondering whether the Justices of the Supreme Court are quite aware of the effect of organized front-door intrusions . . ." *Breard vs. Alexandria,* 341 U. S. 622, 639, 71 S. Ct. 920, 95 L. Ed 1233, 1246, quoting Professor Zechariah Chafee, Free Speech in the United States (1942), p. 406.

45 S. Ct. 571, 69 L. Ed 1070, the owners of private schools were held to be entitled to assert the rights of potential pupils and their parents. In *Barrows vs. Jackson,* 346 U. S. 249, 73 S. Ct. 1031, 97 L. Ed 1586, a white defendant was allowed to raise the issue that enforcement of a racially restrictive covenant violated the right of prospective Negro purchasers, although no Negro was a party to the suit. To the same effect were the holding in *Meyer vs. Nebraska,* 262 U. S. 390, 43 S. Ct. 625, 67 L. Ed 1042; *Adler vs. Board of Education,* 342 U. S. 485, 72 S. Ct. 380, 96 L. Ed 517; *NAACP vs. Alabama,* 357 U. S. 449, 78 S. Ct. 1163, 2 L. Ed 2d 1488; and *NAACP vs. Button,* 371 U. S. 415, 83 S. Ct. 328, 9 L. Ed 2d 405.

D. Fundamental Rights Of The Employer Are Violated By The Board's Directive

As a natural circumstance accompanying the employer-employee relationship, the Petitioner is in possession of the names and addresses of its employees — who, within the election unit here prescribed by the Board, are more than 4,000 in number (7). This accumulated information, relating to these employees, is of material business value to the Petitioner. For it to be spread abroad would likewise be of material business detriment to the Petitioner.

At a time, such as the present, when employers are competing for employees, a systematic list of the names and addresses of more than 4,000 skilled employees has a very real and very substantial money value. Why, therefore, is it not a taking of Petitioner's property "without due process of law," in violation of the Fifth Amendment to the United States Constitution, when an agency of the Federal

Government forcibly *takes* this from the Petitioner and *gives* it to the Union?

There is no restriction as to what the Union may do with this systematic compilation of names and addresses. It could be sold, and sold repeatedly, for various purposes. Likewise, an indefinite number of different Unions, for considerations and upon terms satisfactory to themselves, could pass it around successively and continuously for years. They could transfer it to a central headquarters for future use by any and all, as they might choose.

Thus would be thwarted the Board's superficial assurance, in its *Excelsior* decision, that a Union can only obtain this information after gaining a thirty per cent following, entitling it to an election (25).[1] The Court of Appeals says that "the Board may be relied upon to adopt preventive sanctions against any such anticipated abuse" (Appendix, p. 5a). It is submitted that neither the employees' nor the employer's rights can thus lightly be made to depend on generalized hopes and speculations.

In its *Excelsior* decision, the Board seeks to justify the requirement in question by comparing the opportunities of persuasion and the latitude of action allowed to the employer, in respect to an employee election, as against those permitted to the Union (20). But an unbiased assessment will convincingly establish that while there is

[1]Likewise, the Board has itself made clear that it will give such list to any Union intervening in a pending representation proceeding. A Union may, however, become an intervenor by securing a "showing-of-interest" card from any one employee. And there is no limit upon the number of Unions which may thus intervene.

indeed an imbalance in the situation, it is not against, but in favor of, the Union. The effect of the present Board ruling, therefore, is not to redress one-sidedness, but to make it strikingly worse.

For example, as has been hereinabove noted, the employer and his representatives, under Board rules, may not visit the homes of employees to discuss the advantages and disadvantages of unionization, or the pros and cons of a forthcoming election. *Peoria Plastics Company,* 117 NLRB 545 (1957). Nor may interested citizens of a community do so. *Utica-Herbrand Tool Co.,* 145 NLRB 1717 (1964). But Union organizers or proponents may, of course, do so — and without restriction or limitation. *Plant City Welding and Tank Co.,* 119 NLRB 131 (1957).

The Labor Board holds that an employer may not discuss any aspect of unionization or Union representation with employees in his office, nor in a "corner" of his plant or place of business. *General Shoe Corp.,* 77 NLRB 124 (1948); *National Caterers of Virginia,* 125 NLRB 110 (1959).

The employer, says the Board, may not prohibit or prevent employees from wearing pro-Union buttons or insignia in his plant or place of business. *Nebraska Bag Co.,* 122 NLRB 654 (1958); *Electric Wheel Company,* 120 NLRB 1644 (1958). But, conversely, the Board bars the employer from encouraging or promoting any wearing of anti-Union buttons or insignia within his plant or premises. *Charles V. Weise Co.,* 133 NLRB 765 (1961); *Henry I. Siegel,* 148 NLRB 1192 (1964); *Lyon, Inc.,* 145 NLRB 54 (1963).

It is flatly held that the employer may not grant or promise a wage increase or any other benefit in order to dissuade employees from unionization. *National Labor Relations Board vs. Exchange Parts Co.*, 375 U. S. 405, 84 S. Ct. 457, 11 L. Ed 2d 435 (1964); *National Labor Relations Board vs. Bailey Co.*, 180 F. 2d 278 (6th Cir., 1950). The Union is, however, completely free to promise and assure employees that if they will vote it in, it will obtain for them whatever wage increases or benefits it wishes to name. *Wilson Athletic Goods Manufacturing Co. vs. National Labor Relations Board*, 164 F. 2d 637 (7th Cir., 1947).

Although Union organizers may freely inquire of employees as to how they are going to vote, the employer definitely is not allowed to do so. *Wagner-Wood Co.*, 148 NLRB 963 (1964); *San Diego Glass and Paint Co.*, 117 NLRB 59 (1957).

A Union which has petitioned for and obtained an election, can have such election cancelled automatically upon its request — simply because it has come to believe that it will lose in such election. The employer, of course, has no such right.

Although the Board now orders the employer to give the Union the names and addresses of his employees, so as to assist the Union in making sure that it will reach employees with its arguments, the Board certainly does not allow the employer any access to the Union's "showing-of-interest" cards, so that the employer would be specifically enabled to place before these employees any arguments as to the unwisdom of their action.

And although the Board, in its *Excelsior* decision, gives fervent lip service to the importance of equal opportunity of communication with employees, it does not require the Union in any way to inform the employer that it is "signing up" his employees, in order that he might communicate to them any disadvantages of unionization.

And the Board maintains this one-sided position even though it also holds nowadays that such "sign-up" cards may be the basis of Board order declaring the Union to be the exclusive representative of the employees—without their voting at all[1] and without the employer ever having had any communication with them, on the subject of the Union, in any way, shape or form.

Indeed, the Board seems virtually to concede that "imbalance" is not a true basis for its present action, when it states in *Excelsior* that it will order the employer to furnish his employees' names and addresses to the Union "regardless of the existence of alternative channels of communication" available to the Union and "regardless" of whether the employer has disseminated any "campaign propaganda" or not (27). This the Board has recently reemphasized. *Crane Packing Co.*, 62 LRRM 1398 (1966).

In its *Excelsior* decision, the Board relies upon certain analogies for the requirement now in question, and the Court of Appeals likewise referred to these (22, Appendix, p. 5a). For example, says the Board:—the names of registered voters in public elections are open to inspection

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[1]And this, despite the statutory provision that in any situation involving a question of representation of employees, the Board "shall direct an election by secret ballot." 29 U.S.C. §159(c)(1).

and copying by anyone; in any election or voting contest within a corporation, stockholders are entitled to obtain the names and addresses of other stockholders; and a candidate for office in a Union is entitled to see that his campaign literature is distributed, at his expense, impartially to all members of the Union.

It is first to be noted that statutes expressly provide for the exact actions referred to in these situations. On the other hand, the Board, as has been hereinabove emphasized, claims, and can claim, no statutory authority for what it is here ordering, except the general provision of the National Labor Relations Act, stating that the Board shall conduct "an election by secret ballot" and "certify the results thereof." 29 U.S.C. §159(c)(1).

Furthermore, the situations which the Board refers to, are hardly analogous to that which is here at issue. Obviously, a public record in a public election is open to one and all. But would the Board contend that a person who, as a result of initiative or circumstance, has in his possession a list of prospective voters in a public election, can be compelled, against his will, to turn over that list to a candidate whom he does not support—or indeed to any candidate?

As to the rights of stockholders to the names and addresses of other stockholders in a corporation, it is to be remembered that they own the corporation and its records. Similarly, with respect to an election to office within a Union, in addition to the specific statutory directive, it is hardly to be overlooked that the members are the Union.

Moreover, an employer, in a recent election case, offered to deliver a complete list of employees' names and addresses to a third party who, at the employer's expense, would mail any and all Union letters, literature or other communications to the employees. The Board quickly ruled this would not be in any way acceptable. *Union Bleachery*, 63 LRRM 1208 (1966).

It is thus to be seen that the Board rejects, in practice, "analogies" which it does not hesitate to press in argument.

It has long been required of the employer that, prior to the holding of an election, in any given case, he shall submit, for inspection by the Union, a list of the employees who come within the eligible voting categories as defined by the Board in its direction of election in such case. The Board in *Excelsior* implies, and in its brief to the Court of Appeals specifically stated, that this being true, "only the element of employee addresses has been added" to the requirements already existing in the Board's long-standing election procedures (18, Board's brief in Court of Appeals, pp. 19-20).

The facts are, on the other hand, that inspection of the voting list has always taken place shortly before the election—either the same day or a day or two prior thereto. The Union has not been allowed to retain a copy, or make a copy, of the list. Upon such listing being delivered to the Board, firm assurance has always been given by the Board that the list will be kept entirely confidential and in no way made available to the Union.

This is certainly a far cry from what the Board is now ordering, namely, that such a list, with addresses added,

shall be delivered to the Board, upon the express understanding that it is to be turned over to the Union weeks in advance of the election, for use by the Union in promoting its organizational campaign among the employees in whatever ways it may see fit.

In the present case, the Petitioner specifically informed the Board, in writing, that it was "entirely willing" to furnish a list of employees, to be used in the holding of the election and for purposes of checking voting eligibilities—according to the Board's "normal practice and procedure." This is undisputed and the District Court so found (47).

It is difficult to understand why the Board stated to the Court of Appeals that "only the element of employee addresses has been added" to the situation as it formerly existed. For the whole theme of the Board's argument in this case is the justifying of its requirement that the employer shall furnish a list for the use of the Union in the Union's campaigning and organizing efforts.

In any event, the Petitioner has put at rest any possible uncertainty on this, by offering—in the District Court and at all times since—to add "the element of employee addresses" to the list which the Petitioner originally tendered for use by the Board according to the "practice and procedure" heretofore existing with respect to employee elections. Thus can be determined the genuineness of the Board's representation that it only seeks to add "the element of employee addresses" to the election procedure as it has heretofore existed.

The Board argues that it must be allowed a very wide discretion in all matters related in any way to an employee

election. But, as has been noted, the Board's charter simply empowers it to hold an election. If this carries with it the authority to order whatever the Board may choose to order in any matter connected with the election, then its power is indeed unlimited. Congress never intended any such thing.

> "The deference owed to an expert tribunal cannot be allowed to slip into a judicial inertia which results in the unauthorized assumption by an agency of major policy decisions properly made by Congress."
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> *American Ship Building Co. vs. National Labor Relations Board,* 380 U. S. 300, 318, 85 S. Ct. 955, 13 L. Ed 2d 855, 867

> ". . .'[U]nless we make the requirements for administrative action strict and demanding, *expertise* . . . can become a monster which rules with no practical limits on its discretion' . . . 'Congress did not purport to transfer its legislative power to the unbounded discretion of the regulatory body.'"
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> *Burlington Truck Lines, Inc. vs. United States,* 371 U. S. 156, 167, 83 S. Ct. 239, 9 L. Ed 2d 207, 215

If the Board's authority be as it claims, then instead of, or in addition to, requiring the employer to turn over to the Union a list of employee names and addresses, when an election is pending, the Board could just as readily order the employer to permit representatives of the Union to come into its Plant and distribute and post Union propa-

ganda there. cf. *J. P. Stevens & Co., Inc. and Industrial Union Department,* AFL-CIO, 157 NLRB No. 90, 61 LRRM 1437 (1966); *J. P. Stevens & Co., Inc. and Industrial Union Department,* AFL-CIO, 163 NLRB No. 24, 64 LRRM 1289 (1967).

The Board could equally require the employer to allow Union representatives to come into his Plant and address his employees during the time for which he is paying the employees. In fact, as has been hereinabove noted, the Board is now waiting in the wings with that very directive.

The Board could, with equal reason, direct the employer, for a period of days preceding an election, to close down his manufacturing operations altogether, so that his employees might have "'full and free" opportunity to attend Union gatherings and become informed on "election issues."

For any and all such directives, the Board could—and undoubtedly would—present the same justifications which it now urges in support of its present order. If its arguments are valid for the present situation, they would seem to be equally valid for those cases. If the Board's phrases and forms of words are to be allowed to prevail here and on the present question, there is no logical reason why they should not prevail in those cases yet to come.

In such manner is government at the discretion of men gradually substituted for government by law. It is respectfully submitted that this is an appropriate occasion in which to lift the hand of judicial restraint.

II.

The Procedures By Which The Board Sought To Obtain District Court Action Are Not Lawfully Available In The Present Situation

A. The Board's Demand Is Not In Any True Sense A Subpoena Of Evidence And Therefore Is Not Enforcible As A Subpoena By A United States District Court

The procedure, by which the Board first undertook to bring this matter before the District Court, was that of issuing a so-called "subpoena," and then asking the District Court to enforce it.

But the document which the Board issued *is not* a subpoena at all. Therefore, the present situation is not covered or touched by the subpoena section of the Statute.

The Board's document directed the Company "to appear before" the Board's Regional Director in Winston-Salem, North Carolina, "to testify." Section 11(1) of the National Labor Relations Act, giving the Board the authority to issue subpoenas, provides that:

> "The Board . . . shall at all reasonable times have access to . . . evidence . . . The Board . . . shall upon application . . . issue . . . subpoenas requiring the attendance and testimony of witnesses or the production of . . . evidence . . ." 29 U.S.C. §161(1)

This subsection goes on to refer five more times to "evidence" and the "production of evidence."

Similarly, the next subsection provides that if a person fails or refuses to obey a subpoena "issued by the Board,"

the District Court has "jurisdiction to issue . . . an order requiring such person to appear before the Board" and "produce evidence" or "give testimony." 29 U.S.C. § 161 (2).

The following subsection likewise refers repeatedly to "testimony or evidence" and to "testifying" and producing "evidence." 29 U.S.C. §161 (3).

Nowhere is there any provision or suggestion that a Board subpoena shall have any purpose or permissibility whatever, except to bring in testimony or evidence. It hardly needs saying that the nature, and the entire nature, of testimony or evidence is the proving or disproving of some fact in issue, or under investigation or litigation.

> "Evidence is the demonstration of a fact; it signifies that which demonstrates, makes clear, or ascertains the truth of the very fact or point in issue, either on the one side or on the other. In legal acceptation, the term 'evidence' includes all the means by which any alleged matter of fact, the truth of which is submitted to investigation, is established or disproved."
>
> 31 C.J.S., Evidence § 2

The Board does not seek the names and addresses of the Petitioner's employees in order to prove or disprove any fact in dispute or under investigation or litigation. It does not seek information bearing upon or answering any question. The Board seeks names and addresses—as has been emphasized and as the Board concedes—for the purpose of aiding and promoting electioneering on the part of the Union. ***In short, the Board is calling on the employer to***

bring forward a means of contacting and communicating with people—such means to be used for such purpose by a party to an election. This is not a subpoenaing of "evidence."

If language is to be allowed to retain any integrity, then the legal phrase "producing of evidence" cannot be stretched to include any and all acts of any nature that may be deemed wise or desirable. The determinative question here is what does 29 U.S.C. §161 deal with. The answer is that it deals only with the producing of evidence. A furnishing of names and addresses for purpose of promoting access to, and communication with, the persons named cannot sensibly or truthfully be termed a "producing of evidence."

When the Board issues a demand calling for the names and addresses of persons, in order that visits may be made to them and literature distributed to them, the Board is not, in such act, calling for testimony or evidence to answer any question, or to prove or disprove any fact. In such situation, therefore, the Board is not issuing any writ or process that 29 U.S.C. §161 authorizes it to issue or that 29 U.S.C. §161 authorizes the District Court to enforce.

> "A 'subpoena' . . . is process, or a writ . . . for the purpose of compelling the attendance of a person whom it is desired to use as a witness . . . A writ which does not cause a witness to . . . give testimony . . . is not a subpoena." 97 C.J.S., Witnesses §20

> "Generally speaking, a subpoena duces tecum may be used to compel the production of any proper documen-

tary evidence, such as books, papers, documents, accounts, and the like, which is desired for the proof of an alleged fact relevant to the issue before the court or officer issuing the subpoena . . ."

97 C.J.S., Witnesses §25e

The District Court rightly concluded that: — "Apart from any question as to whether the aforesaid directive does or does not exceed the plaintiff's lawful authority, the document which was later issued by the plaintiff, entitled 'Subpoena Duces Tecum', does not seek the production of any testimony or evidence to prove or disprove any fact or question in issue in any proceeding either before the plaintiff or before the Court. Section 11(2) of the National Labor Relations Act, 29 U.S.C. §161(2), entitled 'Court Aid in Compelling Production of Evidence and Attendance of Witnesses' is therefore not applicable or relevant to the present situation, and this Court is without jurisdiction to enforce the said document, entitled 'Subpoena Duces Tecum' " (48).

The Board cites various cases in which the Courts have been liberal in enforcing Board subpoenas — but none of these are in point with respect to the basic proposition which the Petitioner is now emphasizing, namely, that, in keeping with the very nature of "subpoenas," the Board, under 29 U.S.C. §161, *has authority to issue a subpoena only for — and the District Court, under the same Statute, has jurisdiction to enforce a subpoena only for — "testimony" or "evidence" to prove or disprove a fact at issue in litigation or investigation.*

B. A United States District Court Has No General Jurisdiction To Issue Injunctive Orders With Respect To Controversies Arising In Labor Board Representation Proceedings

The Board says that leaving aside all question of Board "subpoena" in this case and Court enforcement of such "subpoena," there still "must be implied" in Section 9(c) of the National Labor Relations Act, an "authorization" for the Board to go into a United States District Court and seek — and likewise an "authorization" of jurisdiction to the District Court to grant — an injunction enforcing whatever rule the Board may see fit to make in an election proceeding.

With respect to any such "authorization" to the Board and to the District Courts, it is first to be observed that if such authorization is to be brought into existence, it must indeed be "implied" — for certainly it does not appear in Section 9(c), nor anywhere else in the Act. *And it is to be noted that the Board points to no authority whatever that Section 9(c) or any other portion of the Act, has ever heretofore been interpreted as granting such "authorization" to the Board or to the United States District Courts.*

Congress took pains to write express and specific provisions into the National Labor Relations Act for each purpose as to which it desired to give the Board authorization to seek an injunction or enforcement order in a United States District Court. And it likewise wrote express and specific provisions for each purpose that it desired to give the District Court jurisdiction to grant to the Board an injunction or enforcing order. Examples of

this are Sections 10(j), 10(l) and 11(2), 29 U.S.C. 160(j), 160(l) and 161(2). These specific grants of jurisdiction would have been pointless if the District Courts already had general jurisdiction to implement the National Labor Relations Act.

Apart from these explicit and enumerated grants of jurisdiction to the District Courts, the National Labor Relations Act provides that jurisdiction with respect to the carrying out of Labor Board directives is placed entirely in the United States Courts of Appeals. 29 U.S.C. §160. *Uniformly it has been so held, and uniformly the Board has heretofore so insisted.*

The Board has always been first and foremost in expounding the proposition that the District Courts should keep hands off its election or "representation" proceedings, and that its actions and rulings in such proceedings are to be dealt with only by a *Court of Appeals* — and then *only as developed in unfair labor practice proceedings,* and taken, as unfair labor practice cases, into the Court of Appeals in the manner prescribed by Section 10 of the Act. 29 U.S.C. §160. *Boire vs. Greyhound Corp.*, 376 U.S. 473, 84 S. Ct. 894, 11 L. Ed 2d 849 (1964); *American Federation of Labor vs. National Labor Relations Board,* 308 U.S. 401, 60 S. Ct. 300, 84 L. Ed 347 (1940).

The Court of Appeals, in deciding the present case, overlooks the fact that it has itself only recently reiterated the basic proposition that United States District Courts have no jurisdiction to act with regard to controversies arising in Board representation proceedings. In *Greensboro Hosiery Mills, Inc. vs. Johnston, Regional Director,*

377 F. 2d 28 (4th Cir., 1967) the Court of Appeals for the Fourth Circuit held that the District Court had no jurisdiction to issue an injunction with respect to a ruling of a Regional Director in a Labor Board representation proceeding. The Court there said:

> "In view of the language of the statute, the clear and unambiguous congressional policy behind it and the teachings of the Supreme Court, we hold that the district court was without jurisdiction to entertain this suit . . ."
>
> *Greensboro Hosiery Mills, Inc. vs. Johnston, Regional Director,* 377 F. 2d 28, 32 (4th Cir., 1967)

Only three narrowly defined situations are recognized as exceptions to this principle, namely: — (1) where the Board has taken some action clearly exceeding, or contrary to, the authority delegated to it by the Act. *Leedom vs. Kyne,* 358 U.S. 184, 79 S. Ct. 180, 3 L. Ed 2d 210 (1958); (2) where there is a showing that the Board's action has infringed the constitutional rights of a party. *Boire vs. Miami Herald Publishing Co.,* 343 F. 2d 17 (5th Cir., 1965); and (3) where the action presents questions "particularly high in the scale of our national interest because of their international complexion." *McCulloch vs. Sociedad Nacional de Marineros de Honduras,* 372 U. S. 10, 83 S. Ct. 671, 9 L. Ed 2d 547 (1963).

It is to be seen that these are all situations in which a party to an election proceeding is allowed, within these sharply defined limitations, to challenge, in District Court, a Board ruling or directive issued in such election proceeding. Under exceptions "(1)" and "(2)" above, the present

Petitioner might indeed be entitled to seek District Court injunctive relief against the Board directive here in question. But to the general principle, it has never heretofore been held that there is *any exception* giving to the Board access to the District Court for purposes of seeking an injunction in support of such directive as the Board may have seen fit to issue in an election proceeding.

The Board points to a decision in *Shafer vs. United States*, 229 F..2d 124 (4th Cir., 1956). That was a case arising under the Agricultural Adjustment Act of 1938. 7 U.S.C. §1281. But there, as the Court pointed out, the statute "vested" the District Court "with jurisdiction to enforce the provisions of the statute" (Idem p. 127). But, as has been emphasized, the National Labor Relations Act certainly does not thus vest the District Courts with general jurisdiction to enforce its provisions.

The Board also says that it relies on 28 U.S.C. §1337 (Board's brief in the Court of Appeals, pp. 2, 21). That Statute, however, is a general enactment providing merely that "the District Courts shall have original jurisdiction of any civil action or proceeding arising under any Act of Congress regulating commerce or protecting trade and commerce against restraints and monopolies." It has always been held that such general statutes are subject to the more specific arrangements, jurisdictional and otherwise, of detailed regulatory or enabling acts. And 28 U.S.C. §1337 has never been construed as conferring upon the District Courts any jurisdiction over matters dealt with in the National Labor Relations Act, except to the extent specified in the National Labor Relations Act itself.

In *United Electrical Contractors Association vs. Ordman,* 258 F. Supp. 758 (U.S.D.C., Southern District of New York, 1965), the District Court was asked to intervene in a matter arising under the National Labor Relations Act and to enter an order requiring the Board to issue a formal complaint. The plaintiffs contended, as the Board does now, that the District Court had jurisdiction by virtue of 28 U.S.C. §1337. The Court noted that the "claim of jurisdiction" was based "on the general grant conferred by 28 U.S.C. §1337," but that "the applicable regulatory statute," the National Labor Relations Act, "precludes" the acceptance of any such contention.

The Court concluded that the specific and "applicable Statute (29 U.S.C. §151 et seq.) forecloses the District Court" from assuming jurisdiction in the matter. The United States Court of Appeals for the Second Circuit affirmed the District Court's decision. *United Electrical Contractors Association vs. Ordman,* 366 F. 2d 776 (2nd Cir., 1966).

The District Court in the present case was, likewise, clearly right in concluding that apart from the provisions of Section 11(2) of the National Labor Relations Act, relating to "subpoenas," which the Court held to be not applicable for reasons outlined above, it had "otherwise no jurisdiction to issue an order requiring the defendant to comply with the directive issued by the plaintiff to the defendant in the plaintiff's 'representation' proceeding" (48).

Nevertheless, says the Board, it "must have some method" of enforcing its new rule, other than the setting aside of the result of an election, when an employer fails

to furnish employee names and addresses for the use of the Union.

As to this, it has been pointed out above that the Board has always maintained election proceedings to be its own preserve, jealously guarded against Court intrusions. Likewise, the Board has heretofore seemed to consider its "set aside" procedure as quite adequate to its election cases.[1] Certainly it is currently utilizing such procedure regularly and liberally.

Still further, however, the Board does have another method of action readily available to it. The Board says that the Petitioner's failure to furnish its employees' names and addresses, for the use of the Union, "tends to interefere with a fair and free election" (21, 27). If this is so, then the Petitioner's failure would seem to be an interference with the rights guaranteed to employees by Section 7 of the Act, and therefore an unfair labor practice under Section 8(a)(1) of the Act. 29 U.S.C. §157, 158 (a)(1).

The Board then, need only process an unfair labor practice charge against the Petitioner, with respect to the Petitioner's failure[2] to furnish the employee names and

---

[1]The Board has already notified the Petitioner that upon the holding of the election here involved, if the Union should lose, the Board would promptly and automatically, at the request of the Union, set aside the election result, because of the Petitioner's failure to furnish the employees' names and addresses to the Union.

[2]A charge, alleging that the Petitioner has violated Section 8(a)(1) of the Act is ready at hand to the Board — such charge having been filed against the Petitioner by the same Union which is involved in the present case, and being now pending before the Board. In accordance with the Board's normal practice, it is at liberty to proceed against the Petitioner — with respect to the refusal now in question — under such pending charge.

addresses, and thereupon obtain a decree of enforcement, in the usual manner, from an appropriate Court of Appeals, ordering the Petitioner to cease and desist from such failure.

The Board's only answer to this is a paradox. It says that the Petitioner's failure may not be any violation of any law at all, but only a failure to maintain "laboratory conditions" (26, Board's brief in the Court of Appeals, p. 26).

The Board has in recent years brought into being, a nebulous host of extra-legal requirements which it puts forward under the label of "laboratory conditions." But for present purposes "it is hoist on its petard." For, "laboratory conditions" are not matters cognizable in a Court, unless failure to live up to them is a violation of some law.

> "But jurisdiction of courts of the United States is limited to cases or controversies in law or in equity presenting justiciable issues . . . Courts will not entertain an action or proceeding merely for the purpose of passing upon a novel question or an abstract proposition."
>
> *Harris vs. Texas & Pacific Ry. Co.*,
> 196 F. 2d 88, 90 (7th Cir., 1952)

We have here then a final irony, among the many ironies, of the Board's position in this case. The Board is not willing to say or claim that the Petitioner's failure, to furnish its employees' names and addresses for the use of the Union, is an unfair labor practice under the National Labor Relations Act — or any sort of violation of that law or of any law. Yet it insists that the District Court ex-

ercise a general injunctive jurisdiction, which the District Court does not have, against a party, not claimed to be in violation of any law.

C. Even If The District Court Had Power To Act, Its Decision As To Whether To Do So In This Case, Was Within Its Sound Discretion

Even if the demand issued by the Board were a true subpoena of evidence, and therefore enforcible by the District Court under 29 U.S.C. §161, or if the District Court had general jurisdiction to issue an injunction with respect to this controversy arising in a Board representation proceeding — still, and in either event, it was within the sound discretion of the Court as to whether it would proceed to enforce or enjoin.

The District Court after reviewing the entire case, exercised that discretion as follows:—"If this Court has jurisdiction to enforce the aforesaid document, entitled 'Subpoena Duces Tecum,' or if this Court otherwise has jurisdiction to issue an order requiring the defendant to comply with the plaintiff's aforesaid directive, then, and in either such event, the exercise of such jurisdiction is within the sound discretion of the Court, and the Court, in its discretion, hereby declines to issue such enforcement or order."

As to District Court enforcement of a subpoena, it is to be noted that the Statute grants "jurisdiction" to enforce. It does not direct enforcement.

"We differ with the . . . view that the only question presented by the Board's application is whether the subpoena was regularly issued and duly served in accord-

ance with the Board's statutory power, and that there has been a refusal to obey. The Statute [29 U.S.C. §161 (2)] does not require the District Court to issue the order, but simply gives it jurisdiction to issue. The enforcement of the subpoena is thus confided to the discretion of the District Court, which is to be judicially exercised."

Goodyear Tire and Rubber Co. vs. National Labor Relations Board, 122 F. 2d 450, 453 (6th Cir., 1941)

"A grant of jurisdiction to issue compliance orders hardly suggests an absolute duty to do so under any and all circumstances. We cannot but think that if Congress had intended to make such a drastic departure from the traditions of equity practice, an unequivocal statement of its purpose would have been made.

"We are dealing here with the requirements of equity practice with a background of several hundred years of history. Only the other day we stated that 'An appeal to the equity jurisdiction conferred on federal district courts is an appeal to the sound discretion of courts of equity' . . . We do not believe that such a major departure from that long tradition as is here proposed should be lightly implied . . . [I]f Congress desired to make such an abrupt departure from traditional equity practice as is suggested, it would have made its desire plain."

Hecht Company vs. Bowles, Administrator, 321 U. S. 321, 329-330, 64 S. Ct. 587, 88 L. Ed 754 (1944)

The Board seems to contend that a District Court's action in enforcing a Board subpoena, should be automatic and that the Court should give no consideration to anything except the fact that the Board has issued a subpoena.

This argument reduces the Court virtually to a rubber-stamp or arm of the Board. Congress definitely never intended this, or it would have given the Board authority and power to enforce its own subpoenas.

In providing that the United States District Courts shall have "jurisdiction" to issue orders in enforcing Board subpoenas, Congress was certainly laying down no mandate that the District Court should enforce whatever came before it from the Board bearing the title "subpoena."

Subpoenas are issued as a matter of course from the Labor Board, over stamped signatures, as they generally and freely are issued from the offices of Clerks of Court. But Congress left to the District Courts their own judgment and discretion as to whether they would or would not move into the situation with orders of their own.

With respect to the Board's alternative theory, that a District Court has jurisdiction to step into a Labor Board representation proceeding and issue an injunction, surely the Board itself will admit that the exercise of any such general equity power is discretionary with the Court. This would seem to be elementary indeed. *Brotherhood of Locomotive Engineers vs. Missouri-Kansas-Texas Railroad Company,* 363 U. S. 528, 80 S. Ct. 1326, 4 L. Ed 2d 1379.

". . . [A]ppellant proceeds upon the wholly incorrect assumption that, conceding power, the issuance of the injunctions was mandatory. It is horn book law that 'courts of equity exercise discretionary power in the granting or withholding of their extraordinary remedies, and that although this discretionary power is not restricted to any particular remedy, it is particularly applicable to injunction since that is the strong arm of equity and cause for great caution and deliberation on the part of the court.' "

Reliable Transfer Company v. Blanchard, 145 F. 2d 551, 552 (5th Cir., 1944)

". . . [C]ourts are not to presume a legislative intention to rigidify the traditionally flexible equity practice of granting or withholding injunctive relief in the exercise of sound judicial discretion."

Esquire, Inc. v. Esquire Slipper Manufacturing Co., 243 F. 2d 540, 544 (1st Cir., 1957)

It is particularly appropriate and important that the element of discretion be allowed its weight in the District Court's decision, where there are, as here, significant equitable considerations involved, such as the interests of employees who oppose the giving of their names and home addresses to the union.

Yet the Court of Appeals below has disregarded the District Court's express exercise of its discretion, thereby

essentially ruling that the District Courts are to act automatically, and are not to be allowed any discretion, with respect to this new directive of the Labor Board.

CONCLUSION

Upon all that is herein set forth, the Petitioner earnestly prays the Court for a Writ of Certiorari, directed to the United States Court of Appeals for the Fourth Circuit, to the end that this Court may review the Decision which that Court has rendered in the present case.

Respectfully submitted,

WHITEFORD S. BLAKENEY
Attorney for the Petitioner

APPENDIX

OPINION OF THE COURT OF APPEALS

United States Court of Appeals

FOR THE FOURTH CIRCUIT

No. 11,202.

National Labor Relations Board,
Appellant,

versus

Hanes Hosiery Division — Hanes Corporation,
Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF NORTH CAROLINA, AT GREENSBORO. EDWIN M. STANLEY, CHIEF JUDGE.

(Argued June 2, 1967. Decided October 3, 1967.)

Before HAYNSWORTH, Chief Judge, and BRYAN and WINTER, Circuit Judges.

Solomon I. Hirsh, Attorney, National Labor Relations Board, (Arnold Ordman, General Counsel, Dominick L. Manoli, Associate General Counsel, Marcel Mallet-Prevost, Assistant General Counsel, and Marion Griffin, Attorney, National Labor Relations Board, on brief) for Appellant, and Whiteford S. Blakeney (Blakeney, Alexander & Machen on brief) for Appellee.

ALBERT V. BRYAN, Circuit Judge:

The National Labor Relations Board sought enforcement in the District Court of its subpoena, or in the alternative a mandatory injunction, against Hanes Corporation to compel production of its personnel and payroll records, or a list in lieu, setting forth the names and addresses of all its employees at its plants near Winston-Salem, North Carolina, who were eligible to vote in a scheduled election to determine whether Textile Workers Union of America, AFL-CIO, Hosiery Division should be their collective bargaining representative. The District Court declined to grant the requested orders and the Board appeals. We reverse.

The production was required by the election order, passed July 19, 1966; compliance was directed by July 26, with the election set for August 17, 1966. As well as providing that the records or list be filed with the Board's Regional Director well before the election, the order also directed him to make the data available to the union and all parties in interest.

Upon word of the corporation's refusal to obey the order, the election was postponed and the Director obtained a Board subpoena duces tecum to effectuate the production, pursuant to Section 11(1) of the National Labor Relations Act, 29 USC 161(1). Despite denial of its petition for revocation of the subpoena, the corporation continued in non-compliance. Thereupon the present suit was instituted by the Board to force this discovery, the plaintiff relying specifically upon Section 11(2) of the Act, 29 USC 161(2),

and generally upon the equity jurisdiction of the District Court, 28 USC 1337.[1] Sustaining the corporation's objections, the District Judge was of the opinion that the Act did not authorize the subpoena, and there was no jurisdiction for an injunction here. His view was that the data demanded was not "evidence" directly touching the certification of a representative. In this we think he erred.

Precedent cited for the contested order was the Board's rule announced in Excelsior Underwear, Inc. et al., 156

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[1]29 USC 161: "Investigatory powers of Board

"For the purpose of all hearings and investigations, which, in the opinion of the Board, are necessary and proper for the exercise of the powers vested in it by sections 159 [certification of representatives] and 160 of this title,—

"(1) The Board, or its duly authorized agents or agencies shall at all reasonable times have access to, for the purpose of examination, and the right to copy any *evidence* of any person being investigated or proceeded against that relates to any matter under investigation or in question. The Board, or any member thereof, shall upon application of any party to such proceedings, forthwith issue to such party subpoenas requiring the attendance and testimony of witnesses or the production of any *evidence* in such proceeding or investigation requested in such application. . . ."

"(2) In case of . . . refusal to obey a subpoena issued to any person, any district court of the United States . . . upon application by the Board shall have jurisdiction to issue to such person an order requiring such person to appear before the Board, its member, agent, or agency, there to produce *evidence* if so ordered, or there to give testimony touching the matter under investigation or in question. . . ." (Accent added).

28 USC 1337: "Commerce and anti-trust regulations

"The district courts shall have original jurisdiction of any civil action or proceeding arising under any Act of Congress regulating commerce or protecting trade and commerce against restraints and monopolies."

NLRB No. 111 (February 4, 1966). There an almost identical order was issued, justified as necessary to "promote the communication of election issues to the employees and to aid in challenging the ballots of employees believed to be ineligible to vote." In this case the question of the rule's validity is narrowed by the corporation's willingness to give the Director the employees' names and addresses in accordance with the prior "normal practice and procedure," that is just before the election and exclusively for the confidential inspection of the Director. This concession confined the use of the information to the Director solely for the ascertainment of those who were qualified to vote; it denied the union the right to retain or copy the list.

The information sought by the Director in this case was in our judgment "evidence" of a "matter under investigation or in question" as contemplated by Section 11 of the Act, 29 USC 161. One of the powers vested in the Board was the certification of employee representatives. Section 9, 29 USC 159. The union's petition for the election invoked this power and engendered, as a reasonable incident, inquiry of who were the prospective balloters and the most advisable means of achieving a just and understanding expression of their preference. "The control of the election proceeding, and the determination of the steps necessary to conduct that election *fairly* were matters which Congress entrusted to the Board alone." (Accent added.) Labor Board v. Waterman S. S. Co., 309 US 206, 226 (1940). It seems to us that the Board could justifiably consider an early release of the qualified voters' names and addresses necessary to an intelligent election.

An informed electorate is essential if the result of an election is to be accorded its intended significance and accomplish its aim. Altogether sound reasons were detailed by the Board for its *Excelsior* enunciation. The argument's logic is too obvious to warrant reiteration.

Contrary to the employer's contention, we do not find the *Excelsior* rule violative of the Act's insistence upon an election "by secret ballot." Section 9(c)(1), 29 USC 159 (c)(1). The balloting itself remains unrevealed; the rule runs only to the pre-election period. Nor does the rule impinge the Act's assurance that the employees "shall also have the right to refrain from any or all . . . activities in connection with collective bargaining." Section 7, 29 USC 157. Nothing is exacted of them. Disclosure to the union of their names and addresses is not an interference with the employees' right to organize as guaranteed by Section 8(a)(1) of the Act, 29 USC 158(a)(1). In truth it is an assist to this end.

Apprehension is expressed by the corporation lest divulgement of the records might expose the employees to harassment by the union organizers in solicitation of support. The answer is that every annoyance of the voters is shunned by the seasoned campaigner, and unions are not novices in this area.

There is fear, too, that the union could dispose of the information for commercial exploitation. The Board may be relied upon to adopt preventive sanctions against any such anticipated abuse, and deter it for the future by fitting penalties. Unveiling the information only on the day of

election or a day or two before, the Board points out quite practically, causes challenges which would not occur if the parties had been pre-advised of the electors' qualifications.

In sum, we think fairness in the elective process demands here, as it does in public or corporate elections, the opportunity of contesting parties to communicate their respective positions to the electorate. This includes such completeness of information, and timeliness of its dissemination, as will allow the voters to make a reasoned choice. The relief prayed in the complaint should be afforded; it may be rested on either Section 11 of the Act, 29 USC 161, or the injunctive powers of the District Court, 28 USC 1337. We remand for such an order by that Court.

Reversed and remanded.

JUDGMENT OF THE COURT OF APPEALS

United States Court of Appeals

FOR THE

FOURTH CIRCUIT

No. 11,202.

National Labor Relations Board,

Appellant,

vs.

Hanes Hosiery Division — Hanes Corporation,

Appellee.

Appeal from the United States District Court for the Middle *District of* North Carolina.

This cause came on to be heard on the record from the United States District Court for the Middle *District of* North Carolina, *and was argued by counsel.*

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court appealed from, in this cause, be, and the same is hereby, reversed; and that this cause be, and the same is hereby, remanded to the United States District Court for the Middle District of North Carolina, at Greensboro,

for further proceedings not inconsistent with the opinion of the Court filed herein.

FILED
Oct. 4, 1967

Maurice S. Dean
Clerk

ALBERT V. BRYAN
United States Circuit Judge.

A true copy,

Teste:

/s/ Margaret L. Davis,
Chief Deputy Clerk,
U. S. Court of Appeals for the
Fourth Circuit.

JUDGMENT OF THE DISTRICT COURT

UNITED STATES DISTRICT COURT

FOR THE MIDDLE DISTRICT OF
NORTH CAROLINA
WINSTON-SALEM DIVISION

NATIONAL LABOR RELATIONS BOARD, *Plaintiff* vs. HANES HOSIERY DIVISION-HANES CORPORATION, *Defendant*	Civil Action No. C-182-WS-66

JUDGMENT

THIS CAUSE coming on to be heard before the undersigned and being heard upon the plaintiff's Complaint and the exhibits thereto attached, and the Rule to Show Cause heretofore issued by this Court and the defendant's Answer and amendment thereto;

And the plaintiff and the defendant having filed briefs, and the plaintiff a reply brief, all of which this Court has read and considered;

And the Court having heard oral argument by counsel for the plaintiff and counsel for the defendant;

THE COURT NOW FINDS THAT:

The defendant is a manufacturer of wearing apparel, a substantial portion of which moves in Interstate Commerce.

The plaintiff has been conducting a "representation" proceeding, identified in the plaintiff's records as its Case No. 11-RC-2346, the purpose of which is to ascertain whether the employees of the defendant, in the defendant's Winston-Salem, North Carolina, Hosiery Plants, desire to be represented for purposes of collective bargaining by a labor organization or labor Union, namely, the Textile Workers Union of America, AFL-CIO, Hosiery Division.

In the course of such proceeding, the plaintiff issued a Decision and Direction of Election, in which, among other things, the plaintiff directed the defendant to furnish to the plaintiff a list of the names and addresses of the aforesaid employees.

The plaintiff's essential and primary purpose in directing the defendant to furnish such list was to make the same available to the aforesaid labor Union in order that the said labor Union might be thereby aided in contacting and communicating with the aforesaid employees, in its efforts to win support for its cause among them.

The defendant offered to furnish a list of employees to be used in the holding of an election and for purposes of checking voting eligibilities, according to the plaintiff's "normal practice and procedure," but declined to furnish a list of the employees' names and addresses for the use of the Union in communicating with and promoting its organizing efforts among such employees.

The plaintiff thereupon issued a further document, entitled "Subpoena Duces Tecum," again directing the de-

fendant to furnish the aforesaid list of the employees' names and addresses.

The defendant moved before the plaintiff for revocation of this document. The plaintiff denied this Motion, and soon thereafter instituted the present action in this Court.

Upon the foregoing findings and upon all the facts and circumstances before the Court, the COURT CONCLUDES THAT:

The plaintiff's aforesaid directive to the defendant exceeds the plaintiff's lawful authority.

Apart from any question as to whether the aforesaid directive does or does not exceed the plaintiff's lawful authority, the document which was later issued by the plaintiff, entitled "Subpoena Duces Tecum," does not seek the production of any testimony or evidence to prove or disprove any fact or question in issue in any proceeding either before the plaintiff or before this Court. Section 11(2) of the National Labor Relations Act, 29 U.S.C. 161 (2), entitled "Court Aid in Compelling Production of Evidence and Attendance of Witnesses" is therefore not applicable or relevant to the present situation, and this Court is without jurisdiction to enforce the said document, entitled "Subpoena Duces Tecum".

This Court has otherwise no jurisdiction to issue an order requiring the defendant to comply with the directive issued by the plaintiff to the defendant in the plaintiff's "representation" proceeding.

If this Court has jurisdiction to enforce the aforesaid document, entitled "Subpoena Duces Tecum", or if this Court otherwise has jurisdiction to issue an order requiring the defendant to comply with the plaintiff's aforesaid directive, then, and in either such event, the exercise of such jurisdiction is within the sound discretion of the Court, and the Court, in its discretion, hereby declines to issue such enforcement or order.

NOW, THEREFORE, IT IS ADJUDGED, ORDERED AND DECREED that the plaintiff's prayer for enforcement of the document entitled "Subpoena Duces Tecum" is hereby denied, and the plaintiff's prayer for an order requiring the defendant to comply with the aforesaid directive, issued by the plaintiff to the defendant, is hereby denied, and the said prayers of the plaintiff are also in the discretion of the Court hereby denied, and this action is hereby dismissed.

This 2 day of December, 1966.

/s/ EDWIN M. STANLEY
United States District Judge

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In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 982

HANES HOSIERY DIVISION-HANES CORPORATION,
PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a–6a) and the findings, conclusions, and order of the district court (Pet. App. 9a–12a) are not yet officially reported. The underlying decision and direction of election of the Board's Regional Director are set forth at R. 8–9.[1]

JURISDICTION

The judgment of the court of appeals (Pet. App. 7a–8a) was entered on October 4, 1967. The petition

[1] "R." refers to the appendix to the Board's brief in the court of appeals, a copy of which has been filed with the petition.

for a writ of certiorari was filed on January 2, 1968. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the rule of the National Labor Relations Board that, prior to a representation election, an employer must furnish to the Board the names and address of the employees eligible to vote in the election—which information the Board then furnishes to the contestants in the election—is a valid exercise of the Board's statutory authority to establish fair and adequate election procedures.

2. Whether, where the employer refuses to furnish such information, the Board may compel its production by means of a proceeding in the federal district court.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*) are set forth in the Appendix, *infra*, pp. 11–13.

STATEMENT

In *Excelsior Underwear, Inc.*, 156 NLRB 1236 (1966),[2] the National Labor Relations Board promulgated a rule which requires an employer to file with the Board's Regional Director, prior to the conduct of a representation election, a list of the names and addresses of the employees eligible to vote in the election, and provides that the Regional Director shall then make the list available to all contestants in the

[2] The *Excelsior* decision is set forth at R. 14–29.

election. In the present case the Board has applied that rule to the petitioner.

On April 5, 1966, the Textile Workers Union of America, AFL–CIO, filed a petition with the Board's Regional Director, pursuant to Section 9(c) of the Act, seeking certification as the collective bargaining representative of a group of the Company's employees (R. 7–8). Following a hearing, the Regional Director on July 19, 1966, directed that a representation election be conducted on August 17, 1966 (R. 8–13). Pursuant to the *Excelsior* rule, the Regional Director ordered the Company to furnish, within seven days, an "election eligibility list, containing the names and addresses of all the eligible voters," so that the Director could "make the list available to all parties to the election" (R. 13, n. 3).

The Company notified the Regional Director that it would not furnish the information. The Regional Director postponed the election and, pursuant to Section 11(1) of the Act, issued a subpoena *duces tecum* requiring the Company to produce, at its own or at the regional office, its records containing such information for inspection and copying by Board agents; or, alternatively, to file with the Regional Director a list of the employees' names and addresses (R. 30–31, 35–37). The Company did not comply with the subpoena. The Board then brought an action in the United States District Court for the Middle District of North Carolina to enforce the subpoena, or, alternatively, for a mandatory injunction directing the Company to comply (R. 2–7).

The district court denied relief (Pet. App. 9a–12a). On appeal by the Board, the court of appeals reversed. It held (Pet. App. 6a):

> [F]airness in the elective process demands here, as it does in public or corporate elections, the opportunity of contesting parties to communicate their respective positions to the electorate. This includes such completeness of information, and timeliness of its dissemination, as will allow the voters to make a reasoned choice. The relief prayed in the complaint should be afforded; it may be rested on either Section 11 of the Act * * *, or the injunctive powers of the District Court, 28 USC 1337. We remand for such an order by that Court.

ARGUMENT

The unanimous holding of the court below that the Board may require an employer to furnish the names and addresses of employees eligible to vote in a representation election and may obtain such information through court action is clearly correct, and is in accord with the unanimous holding of the only other court of appeals which has decided the question.[3]

[3] *National Labor Relations Board* v. *Rohlen* (*Crane Packing Co.*), 66 LRRM 2481 (C.A. 7), No. 16096, November 3, 1967. Accord, *National Labor Relations Board* v. *British Auto Parts*, 266 F. Supp. 368 (C.D. Cal.), appeal pending (C.A. 9), No. 21883; *National Labor Relations Board* v. *Teledyne, Inc.*, 66 LRRM 2408 (N.D. Cal.), appeal pending (C.A. 9), No. 22354; *National Labor Relations Board v. Wolverine Industries Division*, 64 LRRM 2060, 2187 (E.D. Mich.); *National Labor Relations Board* v. *Beech-Nut Life Savers, Inc.*, 66 LRRM 2327 (S.D. N.Y.); *Swift & Co.* v. *Solien*, 66 LRRM 2038 (E.D. Mo.); *National Labor Relations Board* v. *Wyman-Gordon Co.*, 65

There is consequently no need for review by this Court, and this long-delayed representation election can now be conducted.

1. Long ago, this Court recognized that, under Section 9(c)(1) of the Act, "Congress has entrusted the Board with a wide degree of discretion in establishing the procedure and safeguards necessary to insure the fair and free choice of bargaining representatives by employees * * *." *National Labor Relations Board* v. *A. J. Tower Co.*, 329 U.S. 324, 330. See also *National Labor Relations Board* v. *Waterman Steamship Corp.*, 309 U.S. 206, 226. The Board's *Excelsior* rule is a reasonable means of effectuating that objective. As the court below pointed out (Pet. App. 5a): "An informed electorate is essential if the result of an election is to be accorded its intended significance and accomplish its aim."[4] Moreover, as the Board pointed

LRRM 2763 (D. Mass.), appeal pending (C.A. 1), No. 7000. *Contra: National Labor Relations Board* v. *Montgomery Ward & Co.*, 64 LRRM 2061 (M.D. Fla.). *National Labor Relations Board* v. *Q-T Shoe Manufacturing Co.*, C.A. 140–67 (D.N.J., January 19, 1968).

[4] There is no inconsistency between this holding and the action of the Second Circuit in *J. P. Stevens & Co.* v. *National Labor Relations Board*, 67 LRRM 2055 (Pet. 8, n. 1), in declining to enforce the portion of the Board unfair labor practice order in that case which gave the union access to the names and addresses of the employees whom it was seeking to organize. The Second Circuit was of the view that the other provisions of the Board's order, which it enforced, afforded an adequate remedy for the unfair labor practices found in that case. However, the court was careful to distinguish the situation here, because the "need for an informed electorate" provides a special justification for requiring a list of the names and addresses of the employees prior to the conduct of a representation election. *Stevens*, *supra*, 67 LRRM at 2064.

out in *Excelsior* (156 NLRB at 1243): "Prompt disclosure of employee names as well as addresses will * * * eliminate the necessity for challenges based solely on lack of knowledge as to the voter's identity," and will tend to facilitate the settlement of other "disputes between employer and union over voting eligibility."

It is immaterial that for thirty years elections under the Act were conducted without the requirement now imposed (Pet. 12), since the Board is authorized, and indeed expected, to modify and improve its election procedures in the light of its accumulated experience. Cf. *National Labor Relations Board* v. *Seven-Up Bottling Co.*, 344 U.S. 344, 349. Petitioner's argument that prior to *Excelsior* unions already enjoyed organizational advantages which employers lack (Pet. 25–28) fails to consider that the employer and the union have a different relation to the employees,[5] and that the employer may make antiunion speeches to employees in the plant during both working and non-working time, while non-employee union organizers normally are not entitled to use the plant premises for organizational purposes.

The *Excelsior* requirement that information be furnished *to the Board,* which the Board will then pass along to all contesting unions, obviously does not violate Section 8(a)(2) of the Act, which makes it an unfair labor practice for an employer to "contribute

[5] While an employee is free to turn his back on union campaigners if he chooses, "Of course, he can't turn his back to the boss if the boss comes to the home. Not if he is in his right mind, he can't." *National Labor Relations Board* v. *Wolverine Industries Division*, 64 LRRM 2060, 2061 (E.D. Mich.).

financial or other support to" a labor organization (Pet. 12–14).[6] See *National Labor Relations Board* v. *Stowe Spinning Co.*, 336 U.S. 226, 230–231; *Kimbrell* v. *National Labor Relations Board*, 290 F. 2d 799, 802 (C.A. 4). Similarly without substance is petitioner's contention that the rule infringes the employees' right "to refrain from" union activity, which is guaranteed by Section 7 of the Act, and also their constitutional rights to freedom of association and privacy (Pet. 14–24). The rule simply gives unions and other groups seeking representation rights an opportunity to reach the employees with their organizational message. It does not compel employees to read union literature mailed to them or to discuss the union with fellow employees or union representatives who might come to their homes for that purpose; and the employees are still free to exercise their statutory right to reject representation by voting against the participating unions in the secret-ballot Board election.[7]

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[6] The cases cited by petitioner (Pet. 13) do not hold to the contrary. In those cases, the employer furnished the employees' names and addresses to only one of two competing unions or groups, in an effort to influence the employees to select or retain the representative whom he favored.

[7] Petitioner's concern that the union may disclose the list of names and addresses to a rival employer, who in turn would pirate petitioner's employees, was fully answered by the court of appeals (Pet. App. 5a). In rejecting the same argument, the Seventh Circuit, in *National Labor Relations Board* v. *Rohlen*, 66 LRRM 2481 (see n. 3, *supra*), observed (p. 2482, n. 2): "Nothing in the record supports the argument that disclosing the names and addresses of employees will in the future or has in the past resulted in piracy"; it cannot be assumed that a union "will engage in conduct of this nature," or, if it does, that the Board will not "provide an appropriate remedy."

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2. The court below also correctly held, as did the Seventh Circuit (see n. 3, *supra*), that the Board could compel the production of such information by a subpoena enforcement proceeding.

Section 11(1) of the Act gives the Board subpoena power to require "testimony of witnesses or the production of any evidence" in its proceedings or investigations (App., *infra*, p. 12). Section 11(2) provides that, in case of a refusal to obey a subpoena, the district court may require the person subpoenaed "to produce evidence" or "to give testimony" (App., *infra*, p. 13). Petitioner contends (Pet. 34–37) that, since the employee names and addresses sought to be obtained will not be used by the Board to prove or disprove any fact in issue but will be made available to the union for electioneering purposes, the list cannot be regarded as "evidence" or "testimony" and hence is beyond the reach of the Board's subpoena power. Petitioner's interpretation of the Board's subpoena power is unduly restrictive.

The entire representation proceeding under Section 9 of the Act, from the filing of the petition to the certification of the election results, is "an investigation." See *Inland Empire District Council* v. *Millis*, 325 U.S. 697, 707. The basic aim of this investigation is to ascertain the wishes of the employees as to representation and, as shown, the Board has reasonably concluded that the unions need to know the names and addresses of the eligible voters to assure that the

electorate will be adequately informed. In view of the admonition in the preamble to Section 11 to construe the Board's subpoena power as extending to "all hearings and investigations, which, in the opinion of the Board, are necessary and proper for the exercise of the powers vested in it by section 9" (App., *infra*, p. 12), the term "evidence," as used in Section 11, is properly construed as encompassing the employee list required under the *Excelsior* rule. *National Labor Relations Board* v. *Rohlen*, 66 LRRM 2481, 2483–2485 (C.A. 7).[8] See also *Cudahy Packing Co.* v. *National Labor Relations Board*, 117 F. 2d 692 (C.A. 10), affirming 34 F. Supp. 53, 56, 59–60 (D. Kans.). Cf. *United States* v. *Morton Salt Co.*, 338 U.S 632, 642–643, 652–653; *United States* v. *Powell*, 379 U.S. 48, 53–54.[9]

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[8] The Seventh Circuit added (66 LRRM at 2484):

> Even if we adopt the orthodox view that evidence tends to prove or disprove the existence of a disputed fact or something in issue, the "something in issue" in a representation proceeding under section 9 is the employee group-preference. An *Excelsior* list, by facilitating a fully informed electorate, is evidence which aids in the establishment of that group-preference.

[9] The court below alternatively held that the Board's suit to compel production of the list was also properly brought under 28 U.S.C. 1337, which gives the district court jurisdiction of all civil suits "arising under any Act of Congress regulating commerce." See *Capital Service, Inc.* v. *National Labor Relations Board*, 347 U.S. 501, 504; *National Labor Relations Board* v. *New York State Labor Relations Board*, 106 F. Supp. 749, 752–753 (S.D.N.Y.), and cases cited therein. See, also, *Walling* v. *Brooklyn Braid Co.*, 152 F. 2d 938, 940–941 (C.A. 2).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ERWIN N. GRISWOLD,
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ARNOLD ORDMAN,
General Counsel,
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Associate General Counsel,
NORTON J. COME,
Assistant General Counsel,
National Labor Relations Board.

FEBRUARY 1968.

APPENDIX

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*), are as follows:

> SEC. 9(c)(1). Whenever a petition shall have been filed, in accordance with such regulations as may be prescribed by the Board—
>
> (A) by an employee or group of employees or any individual or labor organization acting in their behalf alleging that a substantial number of employees (i) wish to be represented for collective bargaining and that their employer declines to recognize their representative as the representative defined in section 9(a), or (ii) assert that the individual or labor organization, which has been certified or is being currently recognized by their employer as the bargaining representative, is no longer a representative as defined in section 9(a); or
>
> (B) by an employer, alleging that one or more individuals or labor organizations have presented to him a claim to be recognized as the representative defined in section 9(a);
>
> the Board shall investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists shall provide for an appropriate hearing upon due notice. Such hearing may be conducted by an officer or employee of the regional office, who shall not make any recommendations with respect thereto. If the Board finds upon the record of such hearing that such a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof.
>
> * * * * *

SEC. 11. For the purpose of all hearings and investigations, which, in the opinion of the Board, are necessary and proper for the exercise of the powers vested in it by section 9 and section 10—

(1) The Board, or its duly authorized agents or agencies, shall at all reasonable times have access to, for the purpose of examination, and the right to copy any evidence of any person being investigated or proceeded against that relates to any matter under investigation or in question. The Board, or any member thereof, shall upon application of any party to such proceedings, forthwith issue to such party subpenas requiring the attendance and testimony of witnesses or the production of any evidence in such proceeding or investigation requested in such application. Within five days after the service of a subpena on any person requiring the production of any evidence in his possession or under his control, such person may petition the Board to revoke, and the Board shall revoke, such subpena if in its opinion the evidence whose production is required does not relate to any matter under investigation, or any matter in question in such proceedings, or if in its opinion such subpena does not describe with sufficient particularity the evidence whose production is required. Any member of the Board, or any agent or agency designated by the Board for such purposes, may administer oaths and affirmations, examine witnesses, and receive evidence. Such attendance of witnesses and the production of such evidence may be required from any place in the United States or any Territory or possession thereof, at any designated place of hearing.

(2) In case of contumacy or refusal to obey a subpena issued to any person, any district court of the United States or the United States courts of any Territory or possession, within the jurisdiction of which the inquiry is carried on or

within the jurisdiction of which said person guilty of contumacy or refusal to obey is found or resides or transacts business, upon application by the Board shall have jurisdiction to issue to such person an order requiring such person to appear before the Board, its member, agent, or agency, there to produce evidence if so ordered, or there to give testimony touching the matter under investigation or in question; and any failure to obey such order of the court may be punished by said court as a contempt thereof.

U.S. GOVERNMENT PRINTING OFFICE: 1969

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 982

HANES HOSIERY DIVISION—HANES CORPORATION, *Petitioner*

vs.

NATIONAL LABOR RELATIONS BOARD

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

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SUPPLEMENTAL BRIEF FOR PETITIONER CITING RECENT COURT DECISION

On January 19, 1968, subsequent to the filing of the Petition for a Writ of Certiorari in the above-entitled matter, the United States District Court, for the District of New Jersey, rendered a decision in a case entitled *National Labor Relations Board vs. Q-T Shoe Manufacturing Co.* This recent decision has not yet been printed in the official reports, but may be found in the following unofficial report — 67 LRRM 2356 (1968).

The case in which this recent decision has been rendered, involved the same questions and issues which are presented by the Petition for a Writ of Certiorari in the present case. It is believed that the Court will find the discussion and reasoning of this recent decision to be very clear and thorough. For the convenience of the Court, this decision is printed as an Appendix hereto.

Respectfully submitted,

WHITEFORD S. BLAKENEY
Attorney for the Petitioner

67 LRRM 2356

NLRB v. Q-T SHOE MFG. CO

U.S. District Court,
District of New Jersey

NATIONAL LABOR RELATIONS BOARD v. Q-T SHOE MANUFACTURING CO., INC. et al., No. 140-67, January 19, 1968

LABOR MANAGEMENT RELATIONS ACT

—Representation election—Names-and-addresses rule—Subpoena—Parties >36.55 >62.252

Employer's motion to add as further defendants approximately 250 employees whose addresses are sought by NLRB in subpoena duces tecum enforcement action against employer in federal district court is denied, notwithstanding contention that disclosure of employees' addresses arguably violates their Constitutional right of privacy because of potential harassment and coercion in their homes, since whether or not Board's subpoena is enforced, employees will be free in future to petition NLRB for remedy to prevent alleged harassment and coercion by union arising from disclosure.—NLRB v. Q-T Shoe Mfg. Co. (DC NJ, 1968) 67:2356.

—Representation election—Names-and-addresses rule—Subpoena—Enforcement—Mandatory Injunction >36.55 >62.252

NLRB subpoena directing employer to provide list of employees' names and addresses for purpose of furnishing to union prior to election was lawful as based on reasonable policy determination by Board, but U.S. district court lacks jurisdiction under Section 11 of LMRA to order employer to produce list, since Section 11 does not authorize Board to use its investigatory and subpoena powers for

sole purpose of transmitting information to parties to representation proceedings without any independent use of information by Board itself. Court also lacks jurisdiction to issue mandatory injunction directing employer to file list, since LMRA impliedly precludes judicial enforcement of NLRB decisions in representation proceedings except where they form basis of enforceable order in unfair labor practice proceeding.—NLRB v. Q-T Shoe Mfg. Co. (DC NJ, 1968) 67:2356.

Petition by NLRB for enforcement of subpoena requiring employer to disclose names and addresses of employees eligible to vote in representation election under LMRA or in alternative for mandatory injunction to require employer to disclose such names and addresses. Enforcement of subpoena denied; injunction denied.

Solomon I. Hirsh and Bernard L. Balicer, attorneys for National Labor Relations Board.

Harry Zax (Bernard H. Fitzpatrick and Thomas Sheehan, of counsel), for defendants.

Full Text of Opinion

COOLAHAN, District Judge:—This matter came before the court upon the complaint of the National Labor Relations Board (hereinafter referred to as "Board"), seeking enforcement of a subpoena *duces tecum* directed to defendant Martin S. Nadler as President of Q-T Shoe Manufacturing Company, Inc., (hereinafter referred to as "Q-T Shoe"), or, in the alternative a mandatory injunction compelling defendant Q-T Shoe to produce the same

material sought under the subpoena *duces tecum*. Jurisdiction of this court is invoked under 28 U.S.C. § 1337 and Sections 9(c) and 11(2) of the National Labor Relations Act (hereinafter referred to as "the Act"), 29 U.S.C. §§ 159(c), 161(2).

The material facts are as follows: The Board is an administrative agency created under the Act and empowered and directed to administer the provisions of that statute, including investigation of questions pertaining to employee representation and representation elections under Section 9 of the Act, 29 U.S.C. § 159. Q-T Shoe is an employer engaged in the manufacture of shoes in interstate commerce within the meaning of the Act, 29 U.S.C. § 152(6), (7). The company's plant in question is located within this judicial district, at Paterson, New Jersey.

On September 20, 1966, Joint Council No. 3 of the United Shoe Workers of America AFL-CIO (hereinafter referred to as "Union"), petitioned the Board's regional office at Newark, New Jersey for a representation election to establish its alleged majority support by the employees at the Paterson plant, and to obtain certification as their collective bargaining representative. The regional office conducted an investigation of the petition and a hearing was held on the question of representation. Thereafter, on November 25, 1966, the Regional Director issued a Decision and Direction of Election pursuant to Section 9(c)(1) of the Act, 29 U.S.C. § 159(c)(1), which directed that an election be held for a unit of approximately 250 production and maintenance employees at the plant. The election was to be conducted by the Board and in accordance with the National Labor Relations Act, the Board's

Rules and Regulations, and the applicable procedure and policies of the Board.

Pursuant to the Board's rule in Excelsior Underwear, Inc., 156 NLRB No. 111, 61 LRRM 1217 (1966); the Board ordered Q-T Shoe to furnish it with a list of names and addresses of all employees eligible to vote in the election. On December 2, 1966, Q-T Shoe notified the Board's Regional Director that it would not comply. By letter of December 5, 1966, the Union notified the Director that it did not want to proceed to election until the information was furnished. Thereafter, the Regional Director issued the instant subpoena *duces tecum* on December 19, 1966, pursuant to Section 11(1) of the Act, 29 U.S.C. § 161(1).[1]

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[1]Section 11 of the Act, 29 U.S.C. §161, provides that:

For the purpose of all hearings and investigations, which, in the opinion of the Board, are necessary and proper for the exercise of the powers vested in it by sections 159 [Section 9, "Representatives and Elections"] and 160 [Section 10, "Prevention of Unfair Labor Practices"] of this title—

(1) The Board, or its duly authorized agents, . . . shall at all reasonable times have access to, for the purpose of examination, and the right to copy any evidence of any person being investigated or proceeded against that relates to any matter under investigation or in question. The Board, or any member thereof, shall upon application of any party to such proceedings, forthwith issue to such party subpenas requiring the attendance and testimony of witnesses or the production of any evidence in such proceeding or investigation requested in such application. Within five days after the service of a subpena on any person requiring the production of any evidence in his possession or under his control, such person may petition the Board to revoke, and the Board shall revoke, such subpena if in its opinion the evidence whose production is required does not relate to any matter under investigation, or any matter in question in such proceedings, or if in its opinion such subpena does not describe with sufficient particularity the evidence whose production is required.

The subpoena directed the defendant Martin Nadler, President of Q-T Shoe, to produce and make available to the Board's regional office the company's personnel and payroll records, or alternatively a list of all employees eligible to vote in the election. It was personally served upon Mr. Nadler on December 19, 1966.

Although Section 11(1) of the Act, supra, and Section 102.31(b) of the Board's Rules and Regulations, 29 C.F.R. 102.31(b), provide for a period of 5 days after service of the subpoena within which any person served who wishes to object may petition the Board to revoke the subpoena, Nadler did not file such revocation petition within five days. Further, Nadler did not appear on December 28, 1966, the return date of the subpoena, and has at all times refused to produce the materials called for therein. Consequently, the Board seeks judicial enforcement by this court of the subpoena *duces tecum,* pursuant to Section 11(2) of the Act, 29 U.S.C. § 161 (2)[2]. The Board alleges that the information sought by the subpoena constitutes evidence relevant to a Board investigation within the meaning of Sections 11(1) and 11(2) and that

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[2]Section 11(2), 29 U.S.C. §161(2), provides in its pertinent parts:

In case of contumacy or refusal to obey a subpena issued to any person, any district court of the United States . . . , within the jurisdiction of which the inquiry is carried on or within the jurisdiction of which said person guilty of contumacy or refusal to obey is found or resides or transacts business, upon application by the Board shall have jurisdiction to issue to such person an order requiring such person to appear before the Board, its members, agent, or agency, there to produce evidence if so ordered, or there to give testimony touching the matter under investigation or in question. . . ."

therefore this court should direct the defendants' compliance.

As an alternative to the requested subpoena enforcement, the Board seeks a mandatory injunction directing divulgence of the names and addresses, on the ground that under 28 U.S.C. § 1337 this court has jurisdiction over actions brought by the Board to enforce valid election rules in effectuation of the policies of the Act.[3] It is the Board's position that this provision vests this court with the power to grant it injunctive assistance in the Board's effort to carry out its authorized duty of supervising elections, despite the absence of any express grant of power to the Board to request injunctive relief for this purpose under the Board's enabling legislation.

The defendants have presented several separate defenses to the complaint, and, in addition, have moved to add as further defendants the approximately 250 employees whose addresses are sought by the Board. I am of the opinion, however, that the motion should be denied and the issues raised by the parties to the present proceeding should be resolved. In making such a ruling, the question for the court to determine is whether the employees "[claim] an interest relating to the subject of the action and [are] . . . so situated that the disposition of the action in [their] . . . absence may . . . as a practical matter im-

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[3]Section 1337 provides that:

The district court shall have jurisdiction of any civil action or proceeding arising under any Act of Congress regulating commerce or protecting trade and commerce against restraints and monopolies.

pair or impede [their] . . . ability to protect that interest . . . ." Rule 19, Federal Rules of Civil Procedure. Defendants contend that the disclosure of the employees' addresses arguably violates their right of privacy under the Due Process Clause of the Fifth Amendment of the Constitution, since to provide the Union with the addresses will subject them to the dangers of harassment and coercion in their homes. In disposing of the defendants' motion, however, it is not necessary for the court to reach the merits of the constitutional right asserted above, or the specific grievance from which the alleged constitutional right arises. Rather, the court need only inquire into the question of whether the disposition of the present action in the absence of the employees will effectively preclude them from protecting their interests later on. The court is of the opinion that this question must be answered in the negative. Whatever the outcome of the present proceeding, and whether or not disclosure of the employees' addresses to the Union in and of itself violates the employees' right of privacy, the employees will be free in the future to petition the Board for a remedy to prevent any alleged harassment and coercion by the Union resulting from such disclosure. Defendants' motion is therefore denied.

My ruling above settles neither the question whether the Board's act of supplying the Union with a list of the employees' addresses violates the employees' constitutional rights, nor whether the defendants have standing to assert such rights. These questions are taken up in a later portion of the court's opinion.

I. Prior to considering the Board's application for enforcement of its subpoena *duces tecum,* it would be helpful

to briefly review the background of the Excelsior rule, the particular rule in dispute. As has been adverted to earlier, it emanates from the Board's decision in Excelsior Underwear Inc., 156 N.L.R.B. No. 111, 61 LRRM 1217 (1966). Under the Excelsior rule, an employer must furnish the Regional Director with a list of names and addresses of all employees eligible to vote in the election, within 7 days after the Regional Director's approval of the election agreement or after the close of the determinative payroll period for eligibility purposes, whichever is later. The list is to be given to all parties, specifically including the union, in order to promote and maximize communication of election issues to the employees and also to aid in challenging possibly ineligible voters. The rule further provides that an employer's failure to file the required list of employees' names and addresses "shall be grounds for setting aside the election whenever proper objections are filed." Excelsior Underwear, supra at 5.

It is now essential to turn to the problem of whether a federal district court, pursuant to Section 11(2) of the National Labor Relations Act, 29 U.S.C. § 161(2), may enforce a Board-issued subpoena directing the employer to produce the list of names and addresses required by the Excelsior rule. The answer to this question does not turn on the validity of the rule itself, but rather, on whether the information sought by the Board is "not plainly incompetent or irrelevant to any lawful purpose . . . ." Endicott Johnson Corp. v. Perkins, 317 U.S. 501, 509, 2 WH Cases 55 (1943). "The control of the election proceeding, and the determination of the steps necessary to conduct

that election fairly . . . [are] matters which Congress entrusted to the Board alone." NLRB v. Waterman S. S. Corp., 309 U.S. 206, 226, 5 LRRM 682 (1940). The purpose behind the Board's passage of the Excelsior rule was to make certain that employees are able to exercise an informed and reasoned choice after hearing all sides of the question concerning the desirability of Union representation, and to facilitate the process of investigating challenges to voter eligibility. Keeping in mind the holding of the Waterman case, it cannot be said that the Board's purpose for seeking the information herein is an unlawful one.

Defendants contend, however, that the subpoena should not be enforced because it seeks information the disclosure of which is required by a rule which was not formulated in accordance with the rule-making requirements specified in Section 3(a) (3) and (4) of the Administrative Procedure Act, 5 U.S.C. §§ 552(a) (3), 553. The short answer to this objection, however, is that the Administrative Procedure Act permits the Board to proceed by either rule-making or adjudication. See SEC v. Chenery Corp., 332 U.S. 194, 201-203 (1947). Moreover, in determining whether a subpoena should be enforced under Section 11 of the National Labor Relations Act, the court is of the opinion that the preceding conclusion is not weakened by the fact that the Excelsior rule was given a prospective application by the Board.

Defendants further assert that the subpoena should not be enforced for the reason that the disclosure of the employees' names and addresses required by the Excelsior

rule is an unlawful abridgment of the employees' right of privacy under the Fifth Amendment of the Federal Constitution. The court will assume, but does not decide, that the defendants have standing to raise this question on behalf of the employees.

The right of privacy has been the subject of very recent and prolonged debate. See e.g., Lamont v. Comm'r of Motor Vehicles, — F. Supp. — (S.D.N.Y. 1967); Symposium on the Griswold Case and the Right of Privacy, 64 Mich. L. Rev. 197 (1965). The court's investigation of several authorities indicates that there is no decision squarely on point with the facts of the present case. The Board relies heavily on Martin v. City of Struthers, 319 U.S. 141 (1943), for the proposition that, assuming that the Union intends to utilize the aforementioned list of names and addresses for the purpose of conducting door to door campaign solicitations, any interest the employees may have in preventing such a practice can only be preserved by their legally protected right to turn members of the Union away from their doors. The decision in Struthers, however, is inapposite. In that case, the Supreme Court struck down a local ordinance prohibiting door-to-door canvassing, on the ground that, on balance with the first amendment right relied upon by the defendant, the privacy right supported by the statute must fail. In the present case, the weighing to be done, in contrast, is between the privacy right and a statutorily based right given to labor unions to seek employee support, and the Struthers decision is no support for the plaintiff's position.

The decision in Breard v. Alexander, 341 U.S. 622 (1950), cited by the defendants, is not, in the court's

opinion, an authority having any direct bearing on the resolution of the immediate issue. The Breard case involved an ordinance prohibiting commercial solicitation from door-to-door without previous permission of home owners. In upholding the constitutionality of the ordinance, the Supreme Court ruled merely that the community's attempt to restrict one form of commercial activity was a valid measure under the police power and not a violation of due process. There is no basis upon which it can be argued that the Breard opinion affords constitutional protection for the interest asserted on behalf of the employees in the present case.

Public Util. Comm'n v. Pollak, 343 U.S. 451 (1952), is more in point. There, the United States Supreme Court, considering the question of whether commercial radio broadcasting to captive audiencies in publicly franchised buses and street cars was an unwarranted and unconstitutional intrusion upon the privacy of unwilling listeners who use public transportation, concluded that no right of privacy was violated. It is quite possible that the holding of this case precludes, *a fortiori,* any conclusion in the present case that the employees right to privacy would be violated by the divulging of their names and addresses, for the captive circumstances faced by the employees in the present case are not comparable, from the point of view of *degree of captivity,* with those faced by the bus riders in Pollak, since the employees here have a legally enforceable right to remove unwanted intruders from their homes. On the other hand, it could be argued that the *quality* of the violation of the right to privacy is greater in the

present case, where it is the security of the home which may be possibly violated, as opposed as to the tranquility of the bus ride. There is no need, however, to finally determine the right of privacy question here, in view of the court's determination of the other issues before it, which will follow.

Having decided that the Board's issuance of the subpoena was lawful within the meaning of Endicott Johnson, supra, because it was based on a reasonable policy determination within the purview of the Board's powers, question still remains as to whether this court has jurisdiction pursuant to Section 11(2) of the Act, 29 U.S.C. § 161(2), to order the defendants to produce the previously referred to list of names and addresses. Resolution of this issue depends on whether, within the meaning of Section 11(1) of the Act, 29 U.S.C. § 161(1), the Board is seeking *"for the purpose of examination . . .* evidence *. . . that relates to any matter under investigation or in question."* A represention proceeding conducted by the Board pursuant to Section 9 of the Act, 29 U.S.C. § 159, is certainly an "investigation" within the meaning of Section 11(1), the object of which is to determine the appropriate bargaining unit for a given group of employees. Inland Empire Council v. Millis, 325 U.S. 697, 707, 16 LRRM 743 (1944). The direction of an election is merely an intermediate step in the investigation, certification being the final and effective act. Labor Board v. International Bhd. of Elec. Workers, 308 U.S. 413, 414, 5 LRRM 676 (1939).

The Board argues that the employees' names and addresses are properly classified as evidence relating to a

matter under investigation to the extent that the list will be utilized by the *Union* for the purpose of communicating election issues and handling challenges to voter eligibility. This is not so. Nowhere do Sections 11(1) and 11(2) of the Act authorize the Board to use its investigatory and subpoena powers for the sole purpose of transmitting information to certain parties to a representation proceeding, as required by the Excelsior rule. The plain language of Section 11(1) of the Act would appear to indicate that there must be some independent use made by the Board itself of evidence obtained pursuant to its investigatory powers under that section. Nor does the court regard FCC v. Schreiber, 381 U.S. 279 (1965), or NLRB v. Friedman, 352 F. 2d 545, 60 LRRM 2258 (3d Cir. 1965), as being dispositive of the issue. The facts of the present case are distinguishable from those presented in both the Schreiber and Friedman cases, in that here the Board is seeking to act as a mere conduit of the information to the Union. Although the court is of the opinion that it is proper for the Board to have the names of all employees of Q-T Shoe, so that those entitled to vote be properly identified, judicial enforcement of the Board's subpoena in the present case would effectively result in the enforcement of the Excelsior rule itself; it was certainly not the intention of Congress under Section 11(2) to confer jurisdiction upon federal courts for the disguised purpose of enforcing the Board's rules of decision. Whether the Excelsior rule should be enforced is a separate question which is governed by other considerations, to which the court presently turns.

II. In the alternative to its request for subpoena enforcement, the Board seeks a mandatory injunction directing the defendants to file the list of employees' names and addresses with the Regional Director, in compliance with the Board's Excelsior rule. Jurisdiction of the court is invoked under 28 U.S.C. § 1337, which vests district courts with jurisdiction "of any civil action or proceeding" arising under any Act of Congress "regulating commerce or protecting trade and commerce against restraints and monopolies." The Board argues that this provision empowers this court to issue an injunction, enforcing the Excelsior rule, despite the absence of any express grant of district court jurisdiction under the Board's enabling act. That the present suit is a "civil action or proceeding" arising under an Act of Congress "regulating commerce," cannot, of course, be denied. Capital Service Inc. v. NLRB, 347 U.S. 501, 34 LRRM 2139 (1954). The pivotal question to be determined, however, is whether provisions of the Act authorizing federal courts to enforce certain orders issued by the Board themselves deprive this court of jurisdiction of the present suit. Stated differently, does the Act itself impliedly preclude the judicial enforcement of decisions rendered by the Board pursuant to its power under Section 9 to conduct representation proceedings? This requires some discussion.

Under the Act, the Board is given the task of performing two principal functions. The first, under Section 9, is the certification of an appropriate bargaining unit of employees; the second, under Section 10, is the prevention of unfair labor practices enumerated in Section 8. Section

9(c) authorizes the Board to conduct an investigation upon the filing of a representation petition, and, if the Board finds that a question of representation exists, to direct an election by secret ballot and certify the results. In addition, the Board is responsible for the implementation of those steps necessary to conduct the election. See Waterman v. NLRB, supra. Section 9, complete in itself, contains no provision for the court enforcement of a Board order issued pursuant to that section. Section 9(d) states, however, that whenever an order of the Board is made pursuant to Section 10(c) directing any person to cease an unfair practice, and there is a petition for enforcement of the order by a court, the Board's "certification and the record of such investigation" is to be included in the transcript of the entire record required to be filed under Section 10(e), and the decree of the court enforcing, modifying, or setting aside the order of the Board is to be made and entered upon the pleadings, testimony, and proceedings set forth in the transcript.

The statutory procedure for the prevention of unfair labor practice is found in Section 10 of the Act. Section 10(a) authorizes the Board to prevent persons from engaging in unfair labor practices. Section 10(b) lays down the procedure by the Board when any person is charged with engaging in an unfair labor practice. If, as a result of the proceedings conducted pursuant to 10(b), the Board is of the opinion that the person so charged has engaged in an unfair labor practice, Section 10(c) empowers the Board to issue an order directing that person to cease the particular practice. Section 10(e) is a provision which

authorizes the Board to petition the appropriate federal court of appeals for the enforcement of its order prohibiting an unfair labor practice.

Whether this court has jurisdiction to enforce the Board's Excelsior rule depends on the construction and meaning to be given to Sections 9(d) and 10(e) of the Act. A fair reading of these two sections leads the court to conclude that Congress has authorized federal courts to enforce Section 9 orders of the Board only where such an order serves as the basis for the court enforcement of a Board order restraining an unfair labor practice. This follows implicitly from the fact that: 1) only Section 10 of the Act permits the Board to seek court enforcement of its orders; 2) Section 9 orders *have* been made judicially enforceable, under the Act, when they are part of a record under Section 10, and sought to be enforced for the purpose of preventing unfair labor practices. One can only conclude, in attempting to glean congressional intent in the case of a thoroughly written and far-reaching statute such as the National Labor Relations Act, that Congress meant what it said, and only what it said, and intended to exclude what it did not say. Thus, enforcement of the Excelsior rule can only occur after it has been properly determined by the Board that the refusal by the defendant to provide the Union with a list of its employees' names and addresses constitutes an unfair labor practice under Section 8(a) (1) of the Act, 29 U.S.C. § 158 (a) (1).

The Board argues, however, that it should not at this time be compelled to find that such a refusal by the defendant violates Section 8(a) (1) of the Act. More spe-

cifically, it insists that the standards evolved by the Board for purposes of the regulation of elections under Section 9 differ considerably from those standards utilized to administer the unfair labor practice provisions of the Act. Thus, the Board contends that the defendants' non-compliance with the Excelsior rule, while improper conduct during the pendency of a representation proceeding, might not be conduct sufficient to constitute an unfair labor practice. Assuming the correctness of this argument, I am of the opinion that it should be addressed to Congress and not to this court. The distinction urged by the Board does not appear to be one which Congress has recognized under Sections 9(d) and 10(e) of the Act. These sections, as interpreted by this court, confer jurisdiction upon Federal Courts of Appeals to enforce a Board order regulating the conduct of a representation proceeding only insofar as it forms the basis of an enforceable order issued pursuant to Section 10(c) of the Act.

I am therefore of the opinion that this court is without jurisdiction to enforce the Excelsior rule, and plaintiff's request for a mandatory injunction is denied.

Let an appropriate order be submitted.